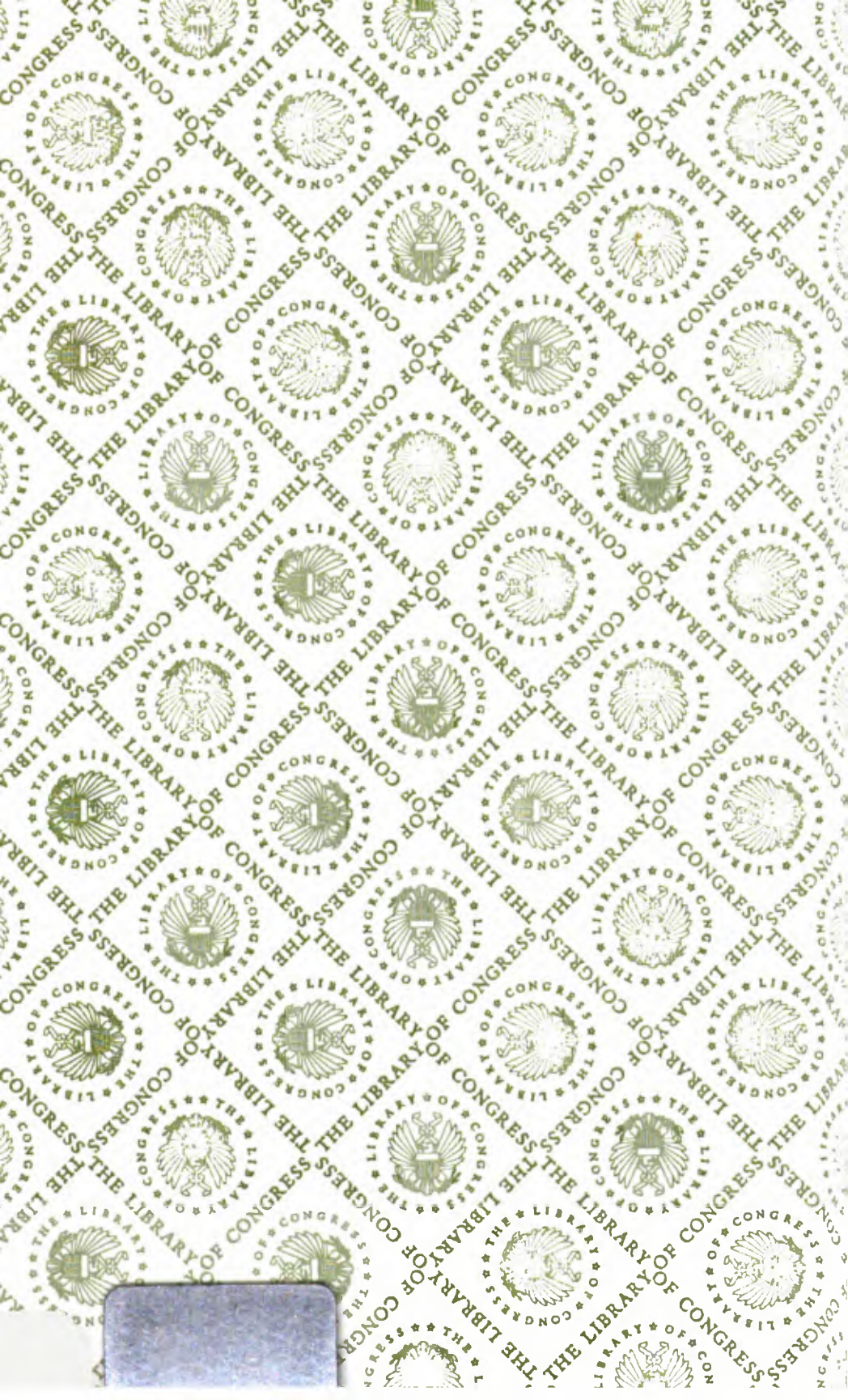
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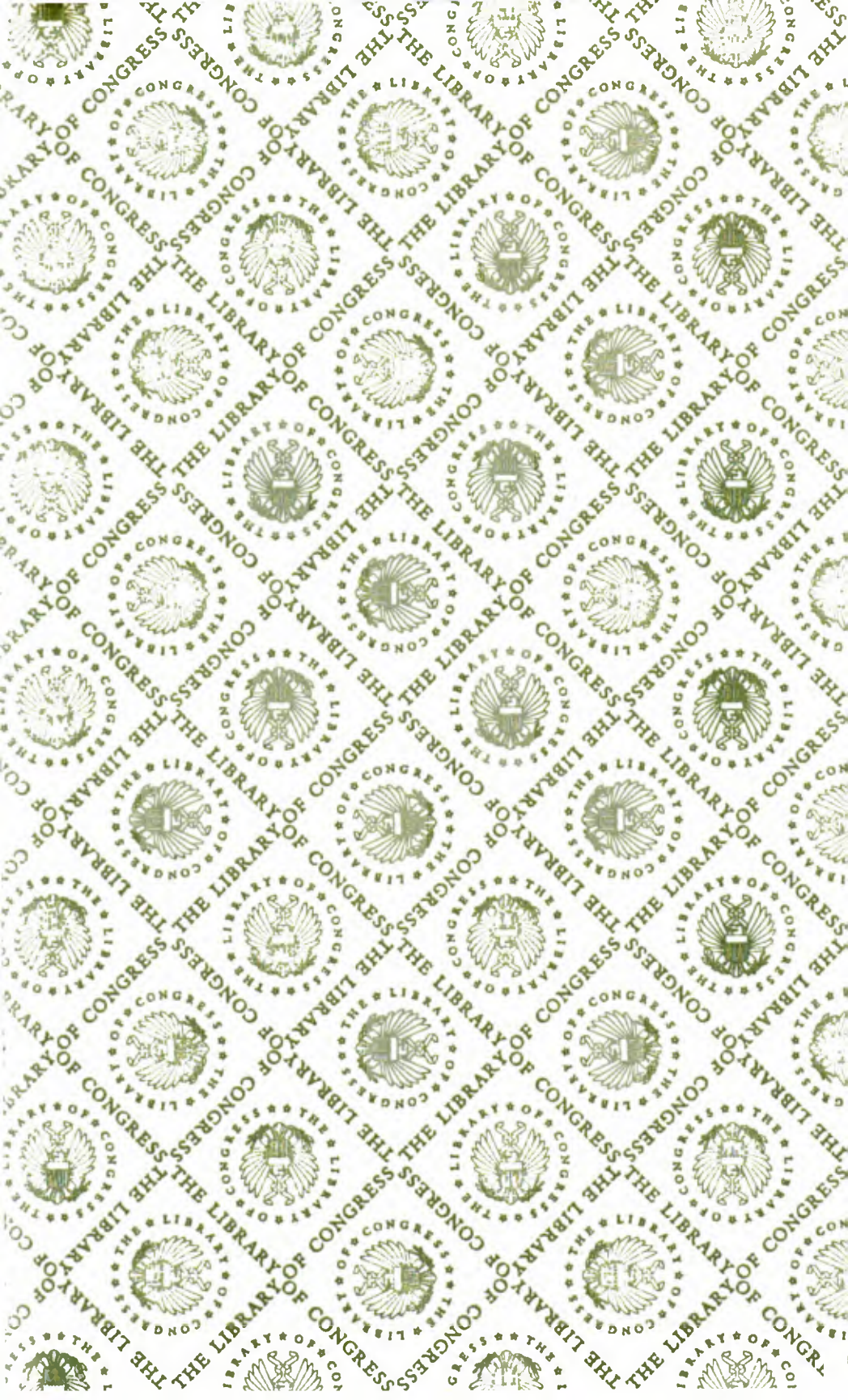
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APPLICATION OF THE RICO LAW TO NONVIOLENT ADVOCACY GROUPS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

JULY 17, 1998

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APPLICATION OF THE RICO LAW TO NONVIOLENT ADVOCACY GROUPS

FRIDAY, JULY 17, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in Room 2141, Rayburn House Office Building, Hon. Bill McCollum [chairman of the subcommittee] presiding.

Present: Representatives Bill McCollum, Stephen E. Buyer, Steve Chabot, Bob Barr, Asa Hutchinson, George W. Gekas, Howard Coble, Charles E. Schumer, Sheila Jackson Lee and Martin T. Meehan.

Also Present: Representatives John B. Shadegg and John Conyers, Jr.

Staff Present: Paul J. McNulty, Chief Counsel; Glenn R. Schmitt, Counsel; Sheree Freeman, Counsel; Melanie Sloan, Minority Counsel; and Veronica Eligan, Staff Assistant.

OPENING STATEMENT OF CHAIRMAN McCOLLUM

Mr. MCCOLLUM. The hearing of the Subcommittee on Crime will come to order.

This morning we will hold a hearing on the use of the Racketeer Influenced and Corrupt Organizations law, which is a Federal racketeering statute, against nonviolent advocacy groups. Congress passed the RICO law in 1970 for the purpose of eradicating organized crime in the United States. While the statute is not limited to being used against organized crime in the classic sense, its purpose is to punish enterprise criminality, that is, patterns of racketeering activity committed by, through, or against an enterprise.

The RICO law is somewhat unusual in that it may be used both by the Government in criminal prosecutions and by individual citizens in civil lawsuits. In civil RICO suits, citizens who have been injured in their business or property, by particular criminal acts may recover three times the amount of their actual damages plus attorneys' fees.

One important limitation to RICO is that it does not allow for civil suits to be brought for personal injuries resulting from crime. These suits must instead be brought under State tort law.

In a case that was tried earlier this year, the RICO law was used as part of a class action lawsuit against a number of pro-life activists. In that case, the jury found that the acts of the protesters vio-

lated both Federal and State extortion laws on two or more occasions and thus also violated the RICO law.

I must say first as a general matter that, as I understand the intent of Congress when this law was passed, it was never the intention that it be used against advocacy groups. More specifically, my understanding from recent lawsuits that have gone on, is that there is some question as to whether the acts of the defendant can be construed as a matter of law to have violated the Federal extortion law.

At the core of American's cherished right of free speech is political speech—speech urging social change. In my view, we should protect persons who exercise this right in a nonviolent way. I am concerned that some judges may interpret speech which strongly asserts a point of view on an important subject to be extortion simply because some who hear it may believe it to be threatening or intended to cause fear in the heart of the listener. And I am also concerned that leaders of groups advocating social change through nonviolent means may be held responsible for violent acts of persons who profess allegiance to the organization's goals but who nevertheless ignore the direction of movement leaders that their actions remain peaceful.

If the RICO statute had been law in the 1960's would we have allowed it to be used against civil rights demonstrators and antiwar activists? Some people felt the effects of the boycotts on their businesses and the fact that some civil rights activities took down the names of persons who crossed the picket lines was intimidating. Some people thought the intensity of the antiwar protest was threatening to them personally. Are we prepared to say that all of these activities were extortion?

And so I ask those who believe that we should subject speech to civil lawsuits, do you believe this because you think strong protest is criminal or because you disagree with the message of the protest?

Having said that, I want to make it clear to all here today that the focus of this hearing is on advocacy groups who use nonviolent means to assert their views. Under no circumstances do I condone the use of violence by any group attempting to bring about social change. Persons who use violence should be punished to the fullest extent of the law.

I will not support any legislation that I believe would allow criminals who commit violence to escape accountability, but I am also committed to preventing a statute created to punish true criminal wrongdoing from being used to chill the expression of the viewpoint with which some people may disagree. To allow this would undermine the use of the law for its intended purpose. More importantly, to allow this would undermine the freedom of speech that we all hold so dear.

I welcome the witnesses to this hearing today. I look forward to hearing their testimony on this important issue, and I recognize Mr. Schumer for any opening remarks he may have.

Mr. SCHUMER. Thank you, Mr. Chairman, and once again I want to thank you for—I don't want to thank you for having this hearing, but thank you for the general fair way you preside over the hearings that you do have.

Ladies and gentlemen, this hearing is billed as a hearing about the use of RICO against advocacy groups. That is not what this hearing is really about. This is about violence at abortion clinics. This is a hearing about a group of people who take the law into their own hands when they cannot get what they want out of the democratic process.

We all know that the issue of choice and abortion is a very difficult, wrenching question for most Americans. I feel strongly about my position on these issues. But I respect the sincerity and the passion of those who disagree with me. What I would tell them, they do not have a lock on morality. They believe strongly in their view; we on the other side believe just as strongly in our view. And if we were to try to use violence to achieve our means because we thought we were getting the message from on high, we would correctly be declared unAmerican, because in America you make your fights in the courts and in the Congress, not with violence. No one has a lock on morality in this country. Otherwise, we might have a king or a dictator.

So this hearing is not about abortion and choice. The issue here is one simple issue, violence. Whatever your position on choice, no one of good faith can support the use of violence against women exercising their constitutional right.

Mr. McCollum, my good colleague, said, well, strong protest. This is not about overexuberance where some people who might feel very, very strongly about an issue occasionally step over a line. What is it? They happened to bump into some butyric acid and throw it on a clinic just by overexuberance? Baloney, that is not the case. People who use violence to shut down abortion clinics are not protesters, they are criminals. They are criminals in the eyes of the law of the United States of America. Not criminals simply in my eyes or people who have my point of view. They are criminals from the point of view of all Americans who believe in our system of justice.

There is a word for people who use violence to change public policy. We have used that word in this committee. I fought with Members together with Members on the other side of the aisle to come to grips with these people. It is called terrorism. That is what you call it. Whether you agree with the protester's point of view or disagree, once you step over the line and conspire to use violence, then you have done something that we in this committee have always called terrorism.

In 1994, I introduced the Freedom of Access to Clinic Entrances Act, the FACE law. It passed with bipartisan support. I thought it was one of the finer moments of the Congress. I sat down with Members who were pro-life, called themselves pro-life. I call myself pro-choice. I said, we are not going to agree on the issue of abortion, but the one thing we can agree upon is that violence should not decide the issue. And Congress rose to that higher calling and passed the FACE law. And in 3 years after FACE became law we saw an enormous drop in clinic violence.

But, unfortunately, there has been an alarming resurgence in violence in the last year and a half. The clinic bombers are back, and they have gotten smarter.

In a particularly insidious development, these terrorist groups have expanded their use of butyric acid attacks. It is a hazardous chemical giving off noxious fumes. They break into abortion clinics and are spreading this acid on the walls and floors. It seeps in and makes the building uninhabitable. Twenty clinics in Florida, Louisiana and Texas have been victimized by these acid attacks in the past few months.

Let us imagine that an organized crime group seeking to get money from an ordinary businessman who wouldn't pay protection snuck into the business at night and put butyric acid on the wall and ruined that small businessman or woman's opportunity to make a living. We would all be outraged. It is no different here. No different.

It is a conspiracy to commit violence. That is what this law was aimed at. When this law goes after people who are not doing violent things, a corporation, a labor union, it may be stretched too far. I think we can debate that. But the entire purpose of RICO was to deal with people who got together, conspired and used violence to achieve their means. That is what Operation Rescue has done in the eyes of the court. It seems pretty obvious, common sense to all Americans that is what some of these groups are doing. If there was ever a law, an instance to which RICO should apply, it is this one.

So let's be clear what we are talking about here. We are not talking, in all due respect to my fine colleague, the chairman of this committee, about peaceful marchers such as in Vietnam who got overexuberant. I was against the Vietnam War, yet I spent more of my time condemning those who used violence, even peaceful, obstructive justice. I was telling people during the Vietnam War, go down to Washington and elect a new Congress. You don't blockade a building or bomb a building.

So I know what it is like to feel strongly about an issue and yet condemn others for the violence they might create because they felt the same way that you felt on the issue. So we are not talking about peaceful marchers. We are not talking about demonstrators who get a little exuberant. We are talking about protecting people who have decided to commit violence to get their way. That is as unAmerican as apple pie is American. These groups are not Martin Luther King; they are John Dillinger.

Now, RICO in this case, I think I mentioned it. I am concerned about using RICO in certain cases where there is no violence. A divorce. We have seen RICO used in divorces when no violence is committed. We have seen it used against companies and unions, but this is not that case. This is not a case of peaceful protest, nor is it a case where RICO is being applied too far and afield.

There is no doubt in my mind that the anti-choice groups in this case are appropriate targets for a RICO suit. They are a conspiracy. They use violence. They terrorize innocent women. This is absolutely a criminal enterprise.

I yield back the balance of my time.

Mr. MCCOLLUM. Thank you, Mr. Schumer.

Mr. Chabot, you are recognized.

Mr. CHABOT. Thank you.

In lieu of making an opening statement myself, I would like to yield to the gentleman from Arizona, Mr. Shadegg.

Mr. MCCOLLUM. Mr. Shadegg, you are recognized.

Mr. SHADEGG. Thank you.

Mr. MCCOLLUM. Mr. Shadegg is the author of the bill which will be discussed today and the guest of the committee today. He is not a member and the only way a nonmember of the committee may be recognized is if a member of the subcommittee yields to him. You are recognized.

Mr. SHADEGG. I appreciate the indulgence of the committee.

Let me simply say that, with regard to the issue of violence at abortion clinics or violence by protesters on any issue, I could not agree more with my colleague from New York, Mr. Schumer. Violence is deplorable and unacceptable in this society as a means of expressing oneself. It is absolutely unacceptable as a means of expressing oneself in terms of political debate.

Violence should not be tolerated, and if this issue were one that raised the question of violence, if the question were "would we be taking away the rights of those who had been injured because of violence at an abortion clinic," I would not consider supporting legislation and I would be on Mr. Schumer's side of this debate. However, that is, in fact, not what this bill is about; and I think we have an honest disagreement on that issue.

The RICO statute contains many predicate crimes. A number include robbery, murder, arson, and kidnapping, all of which are violent crimes and all of which can result in the injury of an individual. And if an individual is injured, as one of the witnesses who will come here and testify today, they will still have RICO as a predicate. This bill does not take away their right if they are injured to bring a RICO action.

What currently takes away their right to bring a RICO action is that, under RICO, if you suffer personal injuries, for instance if you are at, say, a clinic and a bomb goes off and you are injured by that bomb, RICO currently does not allow you to recover for those personal injuries. And one of the debates we will air in this room today and one of discussions we will have is whether or not that is a mistake within the drafting of RICO and whether or not, in fact, if you suffer personal injuries you should be able to bring a RICO action.

And one of the witnesses, one of the most scholarly witnesses before us today who is the author of the RICO Act will advocate we ought to include personal injuries—take away the bar so that people who suffer personal injuries as a result of violence, including violence at an abortion clinic, would be able to recover. Right now, they can't recover. As a result of perhaps this legislation they would be able to recover.

But let me make it very, very clear. The legislation we are talking about simply says that in civil RICO you could no longer use extortion as the predicate offense if the extortion did not include someone being injured as a result of one of those other prior predicate offenses, such as robbery, murder, arson. The case of a bombing or kidnapping could involve taking somebody at a protest and kidnapping them or keeping them from having free movement.

So I hope we can keep this discussion on an intellectual basis. I hope we can keep emotion out of it.

It is an issue of whether the RICO statute is currently being misused to quell first amendment rights. I believe that the first amendment is an extremely important part of the fabric of this society, that it is essential that people be able to express themselves. It is essential that people who oppose abortion should be able to protest in front of abortion clinics, people who oppose war should be able to express themselves where they want in front of Government buildings, people who support or oppose gay rights should be able to express themselves and not subject themselves when they exercise their first amendment rights. They should be able to either support or oppose gay rights or support or oppose war or abortion, not expose themselves to a RICO action which will freeze their first amendment rights and preclude them from being able to express themselves.

I commend the chairman for holding this hearing. I do not believe it is about the issue of abortion. I believe it is about the issue of the first amendment and free speech and the right of people to speak out and speak their mind, which is at the heart of this society.

Mr. CHABOT. I yield back the balance of my time.

Mr. MCCOLLUM. Mr. Meehan, you are recognized.

Mr. MEEHAN. Thank you, Mr. Chairman. I know that we are dealing with a complex subject today. I know that abortion is among the most complicated moral questions with which our society must grapple.

The RICO statute is a sprawling statute with vaguely worded predicates and with a plain meaning that departs from the intention of some of its authors. I know that those who protest outside abortion clinics are not cookie-cutter clones in terms of their methods, and I know that the lines between speech and conduct and protected and unprotected expressive activity are hazy. Despite all that uncertainty, I can say the following with confidence.

First, certain extremists in the pro-life movement have made a concerted effort to bully clinics into folding up their tents and indeed to intimidate women from exercising their constitutional rights. There have been acts of violence—shootings, bombings, arson. There have been expresed threats of violence—shouted, whispered, phoned anonymously; and there have been implicit threats of violence achieved by exploiting the reasonable fears of clinic employees in pregnant women.

Imagine the psyche of clinic employees in particular. They know the sordid history of antiabortion violence. They know the names of Paul Hill and John Salvi. They know colleagues who wear bullet-proof vests to work every day. In this context, aggressive blockades and mob tactics give rise to reasonable fears of injury on their part. Extremist antiabortion conspirators know this, and they have used it to their benefit. We must use every legal means at our disposal to put an end to this climate of intimidation and allow women to exercise their right to choose.

Second, the first amendment is not a shield for every type of conduct that has an expressive element. Between their efforts to ban flag burning and gag abortion providers at home and abroad, some

Members of Congress have attempted to wield the first amendment as a club to destroy worthy initiatives ranging from campaign finance reform to clinic access protections. There is a deliberate distortion here of the law. The first amendment does not protect ideologically motivated violence. It does not protect ideologically motivated threats of violence, and it does not protect extortion.

We must not let those who seek to deprive others of their constitutionally protected rights wrap themselves in the cloak of the Constitution.

Third and last, the draft bill under consideration today, the so-called Civil RICO Clarification Act of 1998, is unacceptable. It is hard to understand the rationale for eliminating extortion from the predicates for a civil RICO statute.

If the extortion predicate is so objectionable, why not strike it as a basis for criminal RICO as well? If the supposed problem is the application of the extortion predicate to political protest, why not either amend the statutory definition of extortion or state expressly that RICO shall not apply to criminal acts not motivated by an economic purpose? In short, this bill lacks coherence unless it is viewed as a pardon for the Scheidler defendants.

Mr. Chairman, peaceful protests outside clinics clearly should not be the subject of civil RICO actions, but we should not deceive ourselves into thinking that all clinic protest falls into this category, even if the protest does not amount to bombing or arson. Violence can be at the core of threats and deliberate intimidation, and that is not constitutionally protected behavior.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Mr. Meehan, you are certainly welcome.

Mr. Gekas?

Mr. GEKAS. The very fact that some of the remarks made by our colleagues have turned this opening statement portion into an abortion essay marks what problems we have witnessed over the years with RICO. This committee, the chairman will recall, has several times in the last 15 years attempted to redefine RICO and try to draw it into its original intents.

To have witnessed RICO reaching into divorce cases when racketeering was supposed to be the basis of the original enactment of the law signified something had to be done.

To now allow a hearing in which we are going to be engaged to focus on one issue and what some of our colleagues believe is a threat to their pet issue, shall we say, is worthwhile only from one standpoint. Maybe this will give us another opportunity to revisit what RICO is or should be and to revitalize the effort on the part of many of the members on the Judiciary Committee to revert to the original intent of RICO and to try to circumscribe its reach.

I thank the chair.

Mr. MCCOLLUM. Thank you, Mr. Gekas.

Mr. Coble, do you have opening remarks?

Mr. COBLE. No.

Mr. MCCOLLUM. Mr. Buyer?

Mr. BUYER. I came late, and I just got a briefing on what Mr. Schumer's comments and action were, which are a little bothersome but not surprising. I don't want to comment on those. This

is not about—and I respect Mr. Schumer—and this is not about the questions on access to abortion clinics and that kind of thing.

My concern about this bill is not how you roll your eyes when someone else speaks, but my concern about the bill is what about the application if we are going to use RICO against protests? Then you could have someone go after even union activity, and that is a ridiculous perversion of the RICO statute. So it is how we rein back in RICO to a little more common sense, and so I am pleased you are having the hearing today, and I look forward to the witnesses' testimony.

Mr. MCCOLLUM. Thank you, Mr. Buyer.

With that, I will introduce our first panel which consists of one witness.

Frank J. Marine is the Acting Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department where he has worked since 1982. He has extensive experience with the RICO law and currently supervises the Department's civil RICO project against involving the Laborer's International Union of North America.

Before coming to the Justice Department, he was the Assistant District Attorney for Kings County in Brooklyn, New York. He received his bachelor's degree from Harper College in 1969 and his law degree from New York University Law School in 1972.

Mr. MCCOLLUM. Without objection, your entire testimony will be put into the record. Hearing none, it is so ordered, and you may summarize your testimony in any way you wish. You are recognized for that purpose.

STATEMENT OF FRANK J. MARINE, ESQ., ACTING CHIEF, ORGANIZED CRIME AND RACKETEERING SECTION, DEPARTMENT OF JUSTICE

Mr. MARINE. Good morning Mr. Chairman and members of the subcommittee.

As he said, I am Frank Marine, Acting Chief of the Organized Crime and Racketeering Section within the Criminal Division of the Department of Justice. Thank you for this opportunity to express the views of the DOJ concerning two draft bills entitled the "Civil RICO Clarification Act of 1998."

Mr. MCCOLLUM. Could the gentleman pull the mike a little closer, please?

Mr. MARINE. I am going to discuss the two bills entitled the "Civil RICO Clarification Act of 1998."

As we understand the effect of the proposed legislation, the two bills would amend the RICO statute to preclude either private plaintiffs or the United States Government from filing a civil RICO lawsuit where the racketeering activity on which such a lawsuit is based consists of "any act or threat involving extortion," which is chargeable under State law, the Hobbs Act, or any other Federal law.

Moreover, one of the bills would also repeal the ability of private plaintiffs or the United States Government to sue for civil relief under the RICO statute if the racketeering activity involved the criminal laundering of the proceeds of alleged extortion.

Finally, we further understand that both of the draft bills purport to extinguish such causes of action in lawsuits which are pending on the date of the legislation's enactment.

Mr. Chairman, the Department of Justice strongly opposes the legislation because it would grievously impair the United States' ability to combat organized crime's corrupt influence over labor unions and labor management relations. Extortion of union members' rights and of employers has been the key to the La Cosa Nostra's corrupt influence over labor unions. However, these bills would preclude the use of extortion crimes in all civil RICO actions, including those brought by the United States, even where the extortion involved murder or other serious acts of violence.

Now, the United States has commenced 16 civil RICO actions for injunctive and other relief since 1982 which involved the mob's domination of particular labor organizations and employer associations through various forms of extortion. Such legislation would severely hamstring the United States in its continuing efforts to root out corruption from labor unions and labor-management relations. Indeed, these bills not only threaten our future use of civil RICO to that end but may also vitiate pending civil RICO actions involving labor unions, many of which are in the enforcement stages following our securing consent decrees with the named defendants in those actions. Mr. Chairman, such a result to our program against organized crime is absolutely not acceptable.

As you are aware, private litigants are not the only possible plaintiffs in a civil RICO suit. Pursuant to the RICO statute, the United States can file civil RICO complaints for injunctive and other equitable relief, such as the appointment of court overseers of corrupt organizations, as well as obtaining judicial disgorgement of property obtained by criminal activity.

While we have not used civil RICO as much as we have in the criminal arena, the United States has filed as least 25 civil RICO cases. Seventeen of these civil RICO actions commenced between 1982 and 1995 have involved corrupt labor-management relations or corrupt labor unions dominated or controlled by the La Cosa Nostra organized crime groups. In 15 of these 17 cases, court-appointed officers were installed to exercise continuing oversight of the affairs of these labor unions or employer organizations which had been victimized by the mob. In 16 of these 17 lawsuits, the complaints alleged that the defendants, and persons acting in concert with them, had committed extortion of tangible or intangible property.

In many of these cases, employers were the victims of extortion by corrupt labor union officials. Moreover, 12 of these 17 civil RICO suits involving labor unions and affiliated entities were based in part on the extortion of property consisting of union members' intangible statutory rights of democratic participation in union affairs.

Such extortion is based on the rationale accepted by the courts that by means of violence, job denials, and the commission of other crimes against union members and others, the mob and its associates can effectively extort union members into giving up their right to freely express their opinions about union affairs, to participate in union business meetings, and to vote for candidates of their

choice for union office—rights which were guaranteed to union members by Congress' enactment of the Labor-Management Reporting and Disclosure Act, or LMRDA.

The bottom line is that, in view of the important role that extortion crimes play in the several RICO complaints filed by the United States to rid unions and labor-management relations of corrupt mob influence, the Department of Justice strongly opposes elimination of extortions predicates in a Government civil RICO lawsuit. As I said, 16 of the Government's civil RICO lawsuits commenced since 1982 which involved labor unions or labor-management relations alleged some form of extortionate activity, either as a racketeering crime or as part of the general description of racketeering activity.

Moreover, if these bills are enacted, the draft bills potentially could require the United States to litigate 9 of the 10 pending civil RICO actions which have alleged extortion involving labor unions and affiliated entities because of the bills' purported effect on lawsuits pending at the time of the bills' enactment. We submit that the proposed legislation would adversely impact these pending cases and could conceivably undo the success of such litigation.

I simply cannot overstate the Department's paramount interest in protecting our ability to use extortion predicate crimes in civil RICO cases so we can continue to eliminate and attack organized crime's corrupt influence over labor-management organizations.

Thank you for the opportunity to express the views on behalf of Department. I would be pleased to answer any questions you may have.

Mr. MCCOLLUM. Thank you, Mr. Marine.

[The prepared statement of Mr. Marine follows:]

PREPARED STATEMENT OF FRANK J. MARINE, ESQ., ACTING CHIEF, ORGANIZED CRIME AND RACKETEERING SECTION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, I am Frank J. Marine, Acting Chief of the Organized Crime and Racketeering Section within the Criminal Division of the Department of Justice. Thank you for this opportunity to express the views of the Department of Justice concerning two draft bills entitled the "Civil RICO Clarification Act of 1998."

As we understand the effect of this proposed legislation, the two bills would amend the Racketeer and Corrupt Organizations Act, or RICO statute, 18 U.S.C. § 1961, *et seq.*, to preclude either private plaintiffs or the United States Government from filing a civil RICO law suit where the racketeering activity on which such a lawsuit is based consists of "any act or threat involving extortion" which is chargeable under state law, the Hobbs Act, 18 U.S.C. § 1951, or any other federal law. Moreover, one of the bills would also repeal the ability of private plaintiffs or the United States Government to sue for civil relief under the RICO statute if the racketeering activity involved the criminal laundering of the proceeds of alleged extortion. Finally, we further understand that both of the draft bills purport to extinguish such causes of action in lawsuits which are pending on the date of the legislation's enactment.

Mr. Chairman, the Department of Justice strongly opposes this legislation because it would grievously impair the United States' ability to combat organized crime's corrupt influence over labor unions and labor-management relations. Extortion of union members' rights and of employers has been the key to the La Cosa Nostra's corrupt influence over labor unions. However, the bills would preclude the use of extortion crimes in all civil RICO actions, including those brought by the United States, even those where the extortion may involve murder and other serious acts of violence. Because the United States has commenced 16 civil RICO actions for injunctive and other relief since 1982 which involve the mob's domination of particular labor organizations and employer associations through various forms of extortion, such legislation would severely hamstring the United States in its continu-

ing efforts to root out corruption from labor unions and labor-management relations. Indeed, these bills not only threaten our future use of civil RICO to that end, but may also vitiate pending civil RICO actions involving labor unions, many of which are in the enforcement stages following our securing consent decrees with the named defendants. Mr. Chairman, such a result is absolutely unacceptable to the Department of Justice.

As you are aware, private litigants are not the only possible plaintiffs in a civil RICO suit. Pursuant to the RICO statute, 18 U.S.C. § 1964, the United States can file civil RICO complaints for injunctive and other equitable relief such as the appointment of court overseers of corrupted organizations and the judicial disgorgement of the property obtained by criminal activity. While not used as frequently as criminal RICO indictments, the United States has filed at least 25 civil RICO suits. Seventeen of these civil RICO actions commenced between 1982 and 1995 have involved corrupt labor-management relations or corrupt labor unions dominated or controlled by organized crime. In 15 of these 17 cases, court-appointed officers were installed to exercise continuing oversight of the affairs of labor unions or employer associations which had been victimized by the mob. Such oversight involved 2 employer associations in the New York metropolitan region and 2 international labor organizations, 3 district labor councils, and 15 local labor organizations affiliated with the Teamsters, Laborers, Hotel Workers, Longshoremen, and Carpenters unions. In 16 of these 17 lawsuits the complaints alleged that the defendants, and persons acting in concert with them, had committed extortion of tangible or intangible property.

In many of these cases, employers were the victims of extortion by corrupt labor union officials. Moreover, 12 of the Federal Government's 17 civil RICO cases involving labor unions and affiliated entities were based in part on the extortion of property consisting of union members' intangible statutory rights of democratic participation in union affairs. Such extortion is based on the rationale that by means of violence, job denials, and the commission of other crimes against union members and others, the mob and its associates can effectively extort union members into giving up their right to freely express their opinions about union affairs, to participate in union business meetings, and to vote for candidates of their choice for union office—rights which Congress guaranteed to union members by enactment of the Labor-Management Reporting and Diselosure Act of 1959 or LMRDA. 29 U.S.C. § 401, et seq.

This latter type of extortion was first used and approved in the first civil RICO action brought by the United States which installed a court-trustee to oversee the affairs of a corrupted labor union controlled by the mob, Teamsters Local 560 in New Jersey. You can also read about the case in the following published case decisions. *See United States* v. *Local 560 of Intern. Broth., Etc.*, 550 F. Supp. 511, 513–25 (D.N.J. 1982), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). Since the *Local 560* decision, the extortion of members' rights of democratic participation in labor union affairs by violence and fear of economic harm has been upheld by the courts in other civil RICO litigation commenced by the United States in actions for injunctive relief. *See United States* v. *International Brotherhood of Teamsters*, 708 F. Supp. 1388, 1397–99 (S.D.N.Y. 1989); *United States* v. *District Council of N.Y.C. Carpenters*, 778 F. Supp. 738, 753–756 (S.D.N.Y. 1991); *United States* v. *Local 1804–I, ILA*, 812 F. Supp. 1303, 1334–39 (S.D.N.Y. 1993), *modified on other grds*, 831 F.Supp. 167, *vacated in part sub nom. United States* v. *Carson*, 52 F. 3d 1173 (2d Cir. 1995), *cert denied*, 516 U.S. 1122 (1996).

I might add that private civil plaintiffs and union members have also pursued this type of extortion in civil RICO actions for damages and other relief. *See Rodonich* v. *House Wreckers Union, Local 95 of LIUNA*, 627 F. Supp. 176, 178–179 (S.D.N.Y. 1985); *O'Rourke* v. *Crosley*, 847 F.Supp. 1208 (D.N.J. 1994). Finally, the Department of Justice has also successfully prosecuted individuals for their extortion of union members' intangible rights by means of violence in violation of the RICO and federal extortion statutes. *See United States* v. *Debs*, 949 F.2d 199, 201–202 (6th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992); *United States* v. *Bellomo*, 954 F.Supp. 630, 642 (S.D.N.Y. 1997).

By its interpretation of the Hobbs Act in the context of civil RICO litigation, the *Local 560* decision established the blueprint to enable the Government to successfully combat mob domination and control of labor unions and labor-management relations. In upholding the extortion of intangible property rights of union members to free speech and democratic participation in union affairs as a basis for civil RICO relief, the United States Court of Appeals for the Third Circuit cited the New York extortion law, on which the Hobbs Act was modeled in 1946, and quoted from a New York court decision which stated that

> [t]he right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

Local 560, supra at 780 F.2d 281 (citations omitted).

Although other violent crimes, sometimes including murder, may be alleged as additional predicate crimes in these cases, extortion is the central crime for prosecuting the mob's primary means of maintaining control of union members. Moreover, such other non-extortion crimes do not reach as far as the federal extortion statutes when coupled with the RICO statute. For example, the Court of Appeals in the *Local 560* decision rejected the argument that Congress intended an alternative federal offense, a non-RICO misdemeanor within the LMRDA, 29 U.S.C. § 530, to be the exclusive remedy for deprivation of union members' LMRDA rights. Instead, the court of appeals concluded that

> the extortion of rights which the government's complaint charged was achieved, not so much by direct physical assault (as is proscribed by section 530), but by more sophisticated and indirect physical and economic threats. It was intimidation and fear, as found by the district court, that caused the members of Local 560 to surrender their LMRDA democratic rights. The Hobbs Act, much more so than section 530, is designed to combat extortion, whether such extortion involves LMRDA rights or more tangible property.

Local 560, 780 F.2d at 283. In regard to the extortionate means used by the mob and their associates to control Local 560, the court of appeals cited the trial court's finding that "the failure to develop any political opposition to the leadership of Local 560 during the past 20 years demonstrated this climate of intimidation." *Id.* at 274. The court also relied on the expert testimony of Professor Clyde Summers that

> "[I]t is beyond belief that 10,000 members would sit by and watch these things done and never utter a peep," unless a substantial number of the membership were fearful for their lives or their jobs.

Id. at 278. In a recent criminal RICO prosecution of mob members and associates in New York, the trial court echoed these same sentiments when it upheld a RICO indictment based in part on the extortion of union members' rights to free speech and democratic participation in union affairs. The court concluded that union

> members' rights to participate effectively in their affairs have direct economic value because the advancement of the members' economic interests through collective action is the *raison d'etre* of unions. The history of labor corruption in this country is an eloquent testament to the proposition that the suppression of union democracy often has been closely linked with the sacrifice of the interests of the rank and file to the enrichment of union leaders and those who have corrupted them.

Bellomo, supra at 954 F.Supp. 643.

In view of the important role that extortion crimes have played in the civil RICO complaints filed by the United States to rid labor unions and labor-management relations of corrupt mob influences, OCRS strongly opposes the elimination of extortion predicates in the Government's civil RICO lawsuits. Sixteen of the Government's 17 civil RICO lawsuits commenced since 1982 which involved labor unons or labor-management relations alleged some form of extortionate activity either as a racketeering crime or as part of the general description of racketeering activity. Moreover, if enacted, the draft bills potentially could require the United States to relitigate 9 of the 10 pending civil RICO actions which allege extortion involving labor unions and affiliated entities because of the bills' purported effect on lawsuits pending as of the date of the bills' enactment. The proposed legislation would adversely impact these pending cases and could conceivably undo the success of such litigation. I cannot overstate the Department's paramount interest in opposing both bills to protect our ability to remedy organized crime's corrupt influence over labor unions and affiliated entities.

Thank you for the opportunity to share the views of the Department of Justice with the Subcommittee. I will be pleased to answer questions which the Subcommittee members may have for me.

Mr. MCCOLLUM. Is the Government's use of civil RICO limited to obtaining injunctive relief or is there some other relief that you can obtain in civil RICO?

Mr. MARINE. There are various forms of equitable relief, including disgorgement. There may be a conflict in the circuits now as to whether or not we are entitled to treble damages. There was one case, I don't recall the cite, that held that we are not, and there may be some lower cases revisiting that issue.

But when we have used it in all of those cases, it is to obtain various forms of equitable relief, appointing court officers to oversee and eliminate corruption, removing people from union office for corruption, and other forms of equitable relief.

Mr. MCCOLLUM. If legislation that we produced in this committee did not apply to the Government, that is, it did not limit the use of RICO by the Government, would the Justice Department still oppose it?

Mr. MARINE. We would have to look at the particular language, and maybe other components of the Department would have a vested interest. Obviously, that would help.

While we still have an interest in protecting union members' rights to bring civil RICO actions, as a couple of the cases that we alluded to, because they have a direct interest in protecting their rights guaranteed by the LMRDA, and again extortion has been the key to these civil RICOs and would be the key to a union member's bringing such a suit, and that would also extinguish theirs. So we would have trouble with that as well.

Mr. MCCOLLUM. The bill that actually was introduced last night, which has a bill number which you will get, by Mr. Shadegg, H.R. 4245, does exclude the Government from it, so I think your testimony has been well received in that regard and probably will not present that problem to you at this point, but the other, of course, still remains in the proposed legislation.

Are you aware of any instances where the Justice Department used the RICO statute or the Hobbs Act alone to prosecute an advocacy group?

Mr. MARINE. Well, I don't know what you mean by advocacy group. That is a term—it is not a term of art.

I would say there have been terrorist groups that may claim advocacy that we have used it against, but let me answer in a broader way.

We think that it is very important that RICO, not only RICO but any criminal statute, be applied neutrally to objective conduct, if conduct falls within the statute, and it has to be criminal, and RICO does not criminalize anything that is not already a crime. If it is a crime and there is criminal intent and all of the elements of RICO are met, then RICO should apply as well as any other statute.

And that was part of the original reasoning in not limiting RICO to organized crime groups, La Cosa Nostra or ethnic organized crime, to avoid the problem with status offenses but rather to properly focus on objective conduct. If someone commits conduct with criminal intent that is made criminal, then, by definition, it is a crime.

Mr. MCCOLLUM. Should an act of civil disobedience be considered extortion under the Hobbs Act?

Mr. MARINE. You can't answer that in the abstract. You have to look at the facts of each case to determine whether the conduct is criminal. It is almost a semantical argument. If someone is engaging in protected first amendment speech, the Constitution trumps a statute.

So in the abstract I would say if it is criminal conduct, so be it. If it is protected speech, the courts have recognized, including Justice Souter's concurring opinion in Scheidler, that defense is out there in a fact-specific scenario. You can't define in a sentence the parameters of the first amendment, it seems to me. I am not a first amendment expert. I am giving you my sense of what I have seen.

Mr. MCCOLLUM. Mr. Schumer, are you recognized for 5 minutes.

Mr. SCHUMER. Thank you, Mr. Chairman, and thank you, Mr. Marine.

Let me ask a question. In the opening statement of the sponsor of the bill he said if there were violence involved, he would want to keep the RICO statute, kidnapping, murder, but not extortion. Doesn't extortion per se involve violence or the threat of violence?

Mr. MARINE. It is one form, but it is not limited to violence or the threat of violence because it could be fear of economic harm. You could be guilty of extortion through inducing fear of economic harm to obtain property.

Mr. SCHUMER. I am asking for the narrower case. If we were to eliminate extortion from RICO, we would certainly eliminate cases where violence or threat of violence was used.

Mr. MARINE. Violence is often an element of extortion, although not necessarily.

Mr. SCHUMER. If you keep your clinic open or if you don't vote this way in a labor union election, we will punch you in the nose; is that extortion?

Mr. MARINE. I don't want to start engaging in hypotheticals without seeing the facts.

Mr. SCHUMER. In many cases extortion does involve violence?

Mr. MARINE. Either the direct or implicit threat of some kind of harm, property harm or personal injury.

Mr. SCHUMER. Thank you.

Mr. MCCOLLUM. Mr. Buyer?

Mr. BUYER. Are you aware of any instances where the Justice Department has used the RICO statute or the Hobbs Act alone to prosecute an advocacy group?

Mr. MARINE. Again, I will go back to my prior answer. I don't know what the parameters of advocacy group means. I know that there have been cases where people have been engaging in acts of terrorism to raise money for the IRA or some other group which have involved—may have involved RICO or the application of the Federal Hobbs Act robbery statutes.

Again, you look at the objective facts; and I might add, we have used RICO for 28 years now, since 1970. There has not been a single case that I am aware of where, either a civil RICO brought by the United States or a criminal RICO brought by the United States, where at the end of the day the courts have held that we have violated anyone's first amendment rights.

Mr. BUYER. Take an animal rights group of whom advocacy in the protection of animals will take paint and throw it upon someone's fur, loss of property. Has the Justice Department ever used the RICO statute against an animal rights advocacy group who uses such violent actions to further their cause?

Mr. MARINE. In the limited fact scenario that you have set, I don't think that RICO would apply if there wasn't a threat of continuity or continuing criminal activity. I don't know of any case that meets the limited facts you set.

Mr. BUYER. Has the Justice Department ever gone after an advocacy group in particular, an animal rights group who in our society we understand that they go after women that wear furs?

Mr. MARINE. We don't go after groups. We go after people who commit criminal conduct. We don't sit out there and say——

Mr. BUYER. Great. Let us not quibble here. We know that there are organizations in our society who are advocacy groups, and we also respect their rights and their advocacy, but when it turns to nonviolence, that is when you get in the business. My question is: Has the Justice Department ever gone after an animal rights group using the RICO statute?

Mr. MARINE. I do not recall a RICO case in which the enterprise was, quote, an animal rights group. Which is not to say that RICO could not apply to the activities of any group if it met all of the elements under an objective view of the facts.

Mr. BUYER. That is helpful for me to understand how the Justice Department picks and chooses where they seek to go.

Mr. MARINE. We are usually reactive. Sometimes we are proactive, particularly when we are targeting identifiable organized crime groups.

Mr. BUYER. I understand. Should acts of civil disobedience be considered extortion under the Hobbs Act?

Mr. MARINE. I cannot answer that question in the abstract because you are trying to define conduct. It becomes a total.

If you are saying that someone engages in protected speech protected by the first amendment, can that be a crime? I would say my understanding of first amendment law, if by definition it is protected speech, it can't be made a crime.

If you are asking me if someone advocates something and commits with criminal intent crimes, can that be made criminal, yes. If I threaten to kill you with speech, I don't think that is protected conduct. If the Sisters of Saint Francis go out and rob banks to give money to charity, it is still robbery.

Mr. BUYER. When you have an advocacy group and it begins with nonviolent intent, if you have a union and somebody punches somebody in the nose, they may say this is a nonviolent protest and something goes wrong. There are a couple of individuals pushing and shoving. Where are you drawing the line here?

Mr. MARINE. We draw the line by looking at all of the facts and the totality of the circumstances to determine whether or not any individual has committed a pattern of racketeering activity and engaged in the affairs of an enterprise through a pattern of racketeering activity with criminal intent where there is a threat of continuity of unlawful activity. We look at all of the facts, and we make a judgment. As you know, all RICO prosecutions in all civil RICOs

have to be reviewed by our office in Washington, and we determine whether or not it meets the law and whether it meets the policy.

Mr. BUYER. Thank you.

Mr. MCCOLLUM. Mr. Meehan?

Mr. MEEHAN. I have a number of questions, but first I would like to yield to my friend and colleague from New York.

Mr. SCHUMER. Has the Department of Justice ever gone after a group that used violence against abortion clinics? He asked you why you didn't go after animal rights groups. I don't think that the Justice Department has gone after any of these groups. We are talking about civil cases here.

Mr. MARINE. I am not familiar with the totality of what the Department of Justice has brought. To my knowledge, we have not had a RICO prosecution which involved a group such as you described.

Mr. SCHUMER. Thank you. I thank the gentleman for yielding.

Mr. MEEHAN. The Scheidler case was brought by NOW.

Mr. MARINE. That was a private civil RICO action.

Mr. MEEHAN. What is the special value of the DOJ being able to file civil RICO suits in addition to criminal RICO prosecutions?

Mr. MARINE. It is primarily, although not exclusively, in the area of labor racketeering. We have found that criminal prosecutions by themselves have not been able to rid unions of entrenched LCN domination. But through civil RICO process we can get a court-appointed officer who sets up standards of behavior and can dismiss and remove corrupt union officials, as well as look into the fiscal and expenditure side of unions to determine whether there has been embezzlement and take action in addition to criminal prosecutions, it has been invaluable.

I believe one of the cooperating witnesses, and it may have been—one of the New York major capos or underbosses who said it was really RICO that takes a bite out of—effective bite out of their control because it takes years to control a union. You have to put somebody in place, you have to nurture him and support him, and that can be undone through RICO. It is very, very important.

Mr. MEEHAN. Mr. Marine, isn't there ample precedent for the application of an extortion charge in cases where the defendant used force or at least the threat of force to cause a victim not to exercise constitutionally protected rights?

Mr. MARINE. I don't know.

Mr. MEEHAN. Do you find anything in the wording of the RICO statute to suggest that the statute can be used only against enterprises motivated by economic gain?

Mr. MARINE. The Supreme Court resolved that issue. There was a conflict in the *NOW* v. *Scheidler* case. No, it does not require an economic gain.

Mr. MEEHAN. Is there any coherent rationale for striking extortion from the list of RICO civil predicates but leaving it untouched as a criminal predicate? Is there any coherent rationale for that?

Mr. MARINE. I wouldn't do it to cause confusion, but whether there is any rationale, it hasn't been put before me.

Mr. MEEHAN. But you don't know of any rationale?

Mr. MARINE. It would make it confusing and difficult, particularly since the Government can bring both civil and RICO—criminal and civil RICO matters, and we would have dichotomy and it could be confusing. Whether or not there is a compelling rationale, minds better than I could probably come up with a rationale.

Mr. MEEHAN. Thank you. I yield back the balance of my time.

Mr. MCCOLLUM. The chair recognizes Mr. Chabot for 5 minutes.

Mr. CHABOT. Mr. Buyer talked about the Justice Department and the fact that they had not gone after certain groups, and Mr. Schumer made the point that it is generally not the Justice Department but a private group which might go after some other type of organization. And I was just wondering, a group, for example, like Earth First, which has a reputation for things like spiking trees and other acts of behavior which could injure people—I would assume that the Justice Department has not taken any action against Earth First?

Mr. MARINE. I am not aware of any prosecution that involves that entity as an enterprise. I am not aware of the group, to be honest.

Mr. CHABOT. You have not heard of Earth First before?

Mr. MARINE. No.

Mr. CHABOT. Okay, I won't ask the question then.

So, obviously, you would not be aware of any private groups that might have used RICO against a group like Earth First?

Mr. MARINE. I am not.

Mr. CHABOT. I do think that RICO can and oftentimes does serve a very legitimate purpose, and I just thought I would give you a minute or two to kind of expound on how effective it has been in going after the mob. If you could compare it with how difficult it was to go after the mob, particularly with respect to labor unions prior to RICO and since RICO?

Mr. MARINE. It was the most effective tool that prosecutors had when it was created. The La Cosa Nostra has been around since 1934 and had its precursors in the 1920's. It wasn't until RICO that we were able to get at them as an organization. The three improvements that it did—first, it focused on the enterprise element of the offense. You just don't look at what an isolated crime is. You look at the enterprise as a whole.

Secondly, RICO expanded Federal jurisdiction by incorporating State predicates. Prior to RICO, many murders could not be prosecuted federally or State arson offenses or other kinds of activities because there wasn't an applicable Federal statute. It then incorporated that as part of RICO.

Third, it permits you to put different acts that, prior to RICO, some courts might have said were separate conspiracies, but under RICO the argument is that it is all related to the affairs of the same enterprise. Like gambling, gambling is legalized in most States. You get it on a jury, they are not going to be too concerned. It is a hard sell on a straight gambling case.

You put that gambling case in the middle of extortion and murder, and you are able to show the jury that that gambling, that money, that is the life blood of the mob. That pays the salaries for the soldiers. You can then show how it all hangs together.

Until RICO, you could not have done that. After RICO, and it has only been since RICO that we have been able to convict the leadership of the La Cosa Nostra families in every city of the United States. In Philadelphia, there is a RICO case in which every 3 or 4 years they have been able to dismantle the leadership, and the leadership is getting weaker and weaker, particularly outside of New York City. RICO has been extremely invaluable.

Mr. CHABOT. Thank you.

I yield the balance of my time to Mr. Shadegg.

Mr. MCCOLLUM. Mr. Shadegg.

Mr. SHADEGG. It is very easy to focus on that which separates us. I would like to focus on that which perhaps unites us. It seems to me that we are close to a consensus on a couple of points.

Everybody agrees that if, in fact, violence was involved, RICO ought to be used as a tool to punish that conduct. I think we can probably find an agreement if there was the threat of violence—either violence itself or the threat of violence to extort—then perhaps the RICO law ought to apply.

What I think we are trying to find here is, some believe, and I think many believe, that because of the broad definition of extortion, RICO is now being used to apply to legitimate free speech protest which does not involve violence or the threat of violence. And what we are trying to do is to rewrite the RICO law so that if you have legitimate free speech conduct which does not involve either violence or the threat of violence, should RICO apply. I argue that it should not.

Now, you express concern that taking extortion out of your authority for use by the Department of Justice in the civil context would be a mistake. There is an alternative draft which amends the definition of extortion to try to seek a more careful balance.

My question is, can you envision a way we can rewrite the RICO statute so that violence and the threat of violence, the normal extortion conduct that we all think about, would still be covered by RICO? However, free speech which does not involve either violence or the threat of violence would not subject those expressing their free speech rights to the threat of a civil RICO action and the immense cost that that involves?

Second, would you join us in helping craft such language or reviewing it and giving it your input?

Mr. MARINE. A multifaceted response.

First, I would urge you not to rewrite RICO at all. It has been too successful. And I know we amend it from time to time and add predicate acts, but when you start reworking this concept, particularly when you limit it to violence, the majority of them do not involve violence. You have embezzlements, substantial bank frauds.

Mr. SHADEGG. We are talking about extortion, violence or the threat of violence, which is what you said was the issue in the union cases that you talked about, violence or the threat of violence.

Mr. MARINE. I would propose that your concern is not so much about RICO. It is, rather, the scope of the underlying predicates. So if you are concerned about extortion, I would focus——

Mr. SHADEGG. That is correct. One of the drafts amends the definition of the underlying predicate.

Mr. MARINE. I would focus only on the offenses giving rise to your concern. And, obviously, we would be happy to take a look at whatever language is there. I can't comment on the abstract. We would have to do an analysis and make an appropriate recommendation.

Mr. SHADEGG. Thank you.

Mr. MCCOLLUM. Mr. Conyers, you are recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to begin by recognizing a lot of my friends here. Professor Blakey is always welcome to the Judiciary Committee on both sides of the Hill, where he has served with great distinction.

I want to thank you, Chairman McCollum, for allowing Emily Lyons to be a witness here today.

And I want to appreciate our colleague from Arizona, Mr. Shadegg, who has given a great deal of attention to this subject matter; and because of his legal background, I hope that he will consider joining the Judiciary Committee. We have great need for the kind of experience that he brings.

The bill he introduced last night, though, sort of took us a little bit by surprise. We already had two measures on this and they were proposals, they were not introduced. He came forward and put his in, and I will be interested to talk with him about it in terms of how it can be distinguished from the two already pending proposals.

Now, Professor Blakey has received a lot of credit here, and deservedly, because every time somebody praises the RICO statute, I think back to the way, and the work that went into the creation of this very important civil and criminal remedy, and so I am pleased that we are holding this hearing. It is a very important hearing. This is a very important set of laws, both civil and criminal.

To me, the heart of the matter is, what does RICO add to the general body of criminal and civil law? It seems to me that unless we begin to look at it in that context and then get back to why taking extortion out of RICO, or to put it conversely, what is the benefit that having extortion in the RICO statutes, how does it commend the prosecution of law in the United States? So I would like to engage you in a discussion along those lines.

Mr. MARINE. If I may, I will reiterate some of the points that I made earlier.

RICO has been extremely valuable in attacking organized crime. One of the mainstay offenses of organized crime is extortion. Extortion is a series of events, and it has been part of RICO since its inception and ought to remain there because most LCN crew cases involves extortion. They collect what is called the juice tax from gamblers or drug dealers or whatever. So that is essential.

Also, extortion of businesses is becoming, unfortunately, a common occurrence in emerging Asian organized crime groups. It is absolutely essential.

If you just limit it to violence, violent criminals are very smart. They will figure out ways to do it indirectly, which I think are already presently covered because it extends to not just the use of violence but the fear of economic harm. And that is the way that labor unions have extorted businesses, through fear of economic

harm, whether it be price fixing or schemes to rig bids, which is broader than just violence, and those are very, very serious activities that corrupt the core of legitimate business.

Mr. CONYERS. Thank you so much, and I want to commend you for the job that you are doing over at the Department of Justice.

Let me just add this comment, Mr. Chairman. Could you just briefly reiterate why keeping extortion in the RICO statutes is important since the obvious retort is that there is already a law against extortion?

Mr. MARINE. Because then it goes back to our use, in addition to the comments that I have just made, the use of civil RICO for labor unions. The extortion statute that exists does not, as an isolated offense, allow for the kind of equitable relief that we can get through the use of civil RICO. And since extortion has been a central predicate that we have relied on in our civil RICOs, it would seriously undermine our ability to successfully attack the LCN's influence and other organized crime functions. It is mainly La Cosa Nostra's influence over labor unions and labor-management.

Mr. CONYERS. Thank you.

Mr. MCCOLLUM. Thank you.

Mr. Gekas, you are recognized for 5 minutes.

Mr. GEKAS. I am glad the gentleman from Michigan is here because he had historic recollections of the origins of RICO. I read with great interest his arguments at the time that RICO was first proposed and enacted along with those of Abner Mikva who later became a Federal judge and then counsel to the White House.

Both of those foresaw that RICO could reach out into untold avenues of conduct never contemplated by the racketeering—the Edward G. Robinson, James Cagney, Humphrey Bogart, George Raft type of racketeering into divorce cases, of all things. I repeat, that was an anomaly.

Later, the Sedima case, in which Justice Marshall articulated that the Congress should do something to corral the overall impact of RICO, apparently has been left unchanged.

What I want to know first, has the Justice Department ever attempted to, on its own, heed the warnings of Thurgood Marshall in the Sedima case and recommend to the Congress ways and means in which RICO could be improved?

Mr. MARINE. First of all, I am happy to be old enough to remember who George Raft was.

Mr. GEKAS. He was a dancer, too.

Mr. MARINE. A pretty good one, too.

Mr. GEKAS. Like I am.

Mr. MARINE. Yes, over the years we have recommended improvements to RICO, changing the predicates, expanding it to meet the ever-changing nature of organized crime.

Mr. GEKAS. Expanding it? You say that you are looking at ways to expand it?

Mr. MARINE. You said how do we improve it.

Mr. GEKAS. I meant improvement in the nature of the Thurgood Marshall assertion in Sedima in that we ought to be reining it in.

Mr. MARINE. I think our track record speaks for itself, which is that we have carefully internally monitored the use of RICO. We review every proposed RICO prosecution. We have had enormous

success. We have not had a single case where the courts have found that we have violated anyone's first amendment rights.

I recognize, as we all do, that it has a broad array of predicates and that is because the nature of criminality unfortunately is broad, and the nature of ever-emerging organized crime groups are very broad. We have groups today involved in very sophisticated computer fraud. We need the tools to meet the crime, to respond to the crime. That is what we are trying to do.

Mr. GEKAS. I take it that the answer is "no" to my question?

The question was, did the Justice Department ever take into consideration the Sedima warnings or suggestions and suggest then to the Congress or to the Judiciary Committee in particular any changes to follow the lead announced in the Sedima case? The answer apparently is no?

Mr. MARINE. I think the answer is, we follow the teachings of Sedima. I believe your question is trying to say, have you recommended limiting RICO? And our answer to that is, no.

Mr. GEKAS. All right.

Mr. MARINE. But I disagree with the equation of limiting it as the only definition of improvement.

Mr. GEKAS. In some ways I would have to say that your appearance here has become moot if indeed the Shadegg proposal of last night is to be placed into the mix of considerations here, because the Federal Government's role in advancement of RICO is curtailed by that. That is, there is no constriction on the Federal Government if we should adopt the Shadegg principle.

What bothered me is when you said private individuals, for instance in union matters, would still be affected if this Shadegg proposal were made law, even if the Federal Government is no longer a part of it. Are you saying that the Federal Government adopts a position of an individual plaintiff civilly in a non-Federal Government case in any way and pursues the RICO remedies even where the Federal Government is not involved?

Mr. MARINE. I have not seen the new proposal that you have mentioned, and we would want to have time to analyze it. Because there are other components of the Department that may have interest that would be brought to bear. I am interested primarily because the proposal that I am responding to would preclude the Federal Government from using civil RICO for extortion.

Mr. GEKAS. What I want to know is, does the Federal Government adopt the position of a private plaintiff in pursuit of RICO? I thought that——

Mr. MARINE. What do you mean by adopt?

Mr. GEKAS. Maybe I am using the wrong word. You said in response to one of the questions, if the Federal Government is no longer out, you still oppose this bill because there are private plaintiffs, in like union cases, who could use this extortion predicate in pursuit of some of the aims of the union movement or rank and file movement.

What I want to know is, what business is that of the Federal Government and why should you still oppose it?

Mr. MARINE. I would say that other components of the Department would probably have to look at it to see if there is a position

on that. Frankly, I shouldn't probably have stated a position with respect to that.

I can see a concern there, but we would have to look at it and again get input from other components of the Department as to what our position would be.

Mr. GEKAS. I yield back the balance of my non-time.

Mr. MCCOLLUM. Thank you very much.

Mr. Marine, we thank you very much for being with us here today, and thank you for testifying.

Mr. MCCOLLUM. At this point, we will call our second panel forward and ask them, as their names are called, to please be seated in whatever order the name plates appear.

Our first witness is G. Robert Blakey. He is the William J. and Dorothy O'Neill Professor of Law at the Notre Dame Law School. Professor Blakey is considered one of the country's foremost experts in the RICO law, having drafted the statute while he was the chief counsel to the Subcommittee on Criminal Law and Procedure of the Senate Judiciary Committee from 1969 to 1973.

In the early 1960's, he served as a special attorney in the Organized Crime and Racketeering Section of the Justice Department. He also served in the House as chief counsel and staff director of the House Select Committee on Assassinations, which investigated the assassinations of John F. Kennedy and Martin Luther King, Jr.

He is widely published in a number of areas involving criminal law and in particular with respect to the RICO statute. He received his undergraduate and law degrees both from the University of Notre Dame.

Eugene Volokh is a professor of free speech law and the law of government at the UCLA Law School. Before coming to UCLA, he clerked for Supreme Court Sandra Day O'Connor and Alex Kozinski of the United States Court of Appeals for the 9th Circuit. He has written a number of scholarly articles and newspaper articles on free speech, sexual, religious and racial harassment and cyberspace law. He received his bachelor's and law degrees from UCLA.

Thomas Brejcha is counsel to Pro-Life Law Center in Chicago, Illinois. He was lead counsel to the defendants in the case of *NOW* v. *Joseph Scheidler*, one of the first cases in which the civil RICO provision has been used in pro-life demonstrations. He has practiced law for 27 years with several law firms in Chicago, focusing on general business litigation. He received his undergraduate degree from the University of Notre Dame and his law degrees from New York University School of Law.

Jeffrey Kerr is general counsel and director of corporate affairs for the People for the Ethical Treatment of Animals. He coordinated PETA's defense of a RICO lawsuit brought against PETA in 1997 by a vivisection laboratory. He received his undergraduate degree from George Mason University and his law degree from the University of Virginia.

Louis Bograd is a senior staff attorney with the Civil Liberties Union. He has had extensive experience before the Supreme Court and other appellate courts in the area of prosecutory immunity and the uses of civil RICO against protestors. He is a graduate of Princeton University and the Yale Law School.

Mr. MCCOLLUM. We want to welcome all of you here today. We thank you for taking the time to appear here. Your physical testimony will be included in the record in its entirety without objection, and hearing none it is so ordered.

Mr. MCCOLLUM. I would call on you to each summarize your testimony for us, starting first with Professor Blakey.

Professor Blakey, you are recognized.

STATEMENT OF G. ROBERT BLAKEY, ESQ., PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL

Mr. BLAKEY. Thank you.

My name is G. Robert Blakey. I have a full statement with attachments, including a draft bill and an analysis of the law of extortion. I appreciate your kindness in incorporating it into the record as a whole. I would like to skim over the statement.

Should RICO, the Racketeer Influenced and Corrupt Organizations statute, be applied beyond a John Gotti, the gangster, or Charles Keating, the savings-and-loan kingpin, to a Mahatma Gandhi or Dr. Martin Luther King, Jr., or to the SCLC or the NAACP, those individuals and organizations that engage in political or social protest?

I thought not when, as counsel to Senator John L. McClellan, Democrat of Arkansas, RICO's chief sponsor in the Senate, I helped draft the 1970 act. I also advocated as much before the Supreme Court in 1994 when I argued on behalf of the respondents in *NOW* v. *Scheidler.*

Unfortunately, my arguments failed to persuade the Court. The untoward consequences of the Court's limited decision are now playing out in Chicago, where a jury just returned a civil verdict for approximately $85,000 under RICO against Scheidler and others, a verdict mistakenly applauded in an editorial by the New York Times.

In *Now* v. *Scheidler,* Mr. Scheidler was accused of threatening a woman by the name of Connor and causing her to give up her job as part of a national conspiracy. She worked in the clinic. The two abortion clinics sought an injunction, treble damages and attorneys' fee, as RICO properly authorizes against mobsters or swindlers or abortion terrorists, at least where they do injury to business or property. RICO does not, however, authorize recovery for personal injury like Nurse Emily Lyons suffered apparently at the hands of suspect Eric Rudolph or the security guard, who was killed at the same Birmingham clinic bombing.

The target of the Chicago suit was all persons and organizations that demonstrate and allegedly commit acts of trespass and vandalism at clinics. The suit also charged a conspiracy to murder, to kidnap, and to commit arson, charges that the Federal judge in Chicago was later to dismiss as totally lacking in evidence. The clinics alleged that the demonstrations constituted Federal and State extortion, and violence in connection with it, because they threatened the employees, doctors and patients "to give up" participation in or having abortions.

Mr. Chairman, concern with the first amendment is not the special province of Republicans, who are sponsoring this legislation. When Senator McClellan proposed RICO in 1969, Senators Phil

Hart of Michigan and Edward Kennedy of Massachusetts objected to its application beyond organized crime, as did Mr. Conyers. They were concerned that the administration of President Richard M. Nixon would improperly use the statute against the demonstrators opposed to the Vietnam war. In particular, Kennedy pointed to the sit-ins at Army recruiting centers and draft card burnings. The American Civil Liberties Union objected, citing the "massive anti-war demonstrations at the Pentagon" and "the campus disorders which rocked Columbia University," each of which went far beyond constitutionally protected conduct.

The Senators' deep concern was not simply to exclude from RICO constitutionally protected conduct, which couldn't be included in the bill in any event. They did not want RICO's severe criminal and civil sanctions to be used at all in the context of demonstrations of any type. They focused on the breadth of the State offenses that were then incorporated in the bill's definition of racketeering activity, "any act involving danger of violence to life, limb or property."

To meet their objections, Senator McClellan told me to strike the generic definition and inserted a list of specific offenses. I did what I was told. I know my role when I work up here.

No offense remotely related to trespass, vandalism or any other aspect of a civil disturbance that might stray beyond constitutional limits was on the list that I helped draft in the bill. Extortion was included, but its meaning is limited. The definition of extortion, obtaining property by fear, was first used in Federal law in 1947. It was taken from New York law, drafted as part of the Field Code of 1865, which was, in turn, taken from the early English common law. It emphasized—from its earliest beginnings—obtaining property from someone—to get—not depriving someone of property—to give up.

That meaning, too, was reflected in well-established New York and Federal jurisprudence, of which I was fully aware as a former Federal prosecutor and a law professor. I worked in the Department of Justice in the Organized Crime and Racketeering Section in the Labor Rights Unit. I know my Hobbs Act jurisprudence, at least as it was in 1970.

My view of extortion is not unique. Professor Craig M. Bradley, one of the most respected leading scholars of the first amendment, shares it.

My views on extortion are set out in detail, all of the baroque detail from its common law history, in the appendix to my statement. I asked that it be included in the record, and you have done so.

Mr. Bradley's view is set out in his piece in the Supreme Court Review 1994 at page 1291–95.

No knowledgeable statutory drafter in 1969 would have believed that "to protest" could be equated "to extort." A world of legal difference exists, in short, between an organized crime boss who uses a mob-dominated union to throw a picket line around a restaurant, to extract an unlawful payoff from a hapless restaurateur, or a vicious abortion terrorist who savagely bombs a clinic, and a college student who sits in a draft board office to protest the Nation's unwise foreign policy, or a Charles Evers who heads a boycott in Clai-

borne County, Mississippi, to protest the unequal treatment of blacks in the old South.

Similarly, such common law offenses as riot, I quote, "an assemblage of three or more persons who do an unlawful act when such act is done in a violent or tumultuous manner," or the modern statutory offense of coercion, that is, "forcing another to act against his will" were consciously excluded from the list of Federal and State offenses to preclude RICO's use against social or political demonstrations.

The American Civil Liberties Union acknowledged, in a statement inserted in the Senate debates after McClellan had me narrow the bill in response to Senators Kennedy's and Hart's suggestions, with which Senator McClellan was in complete agreement, that RICO's provisions had been, quote, "substantially revised so as to eliminate most of the previously objectionable features."

The ACLU continued to oppose the bill on other civil liberties grounds, as did Mr. Conyers. Indeed, Mr. Conyers' statement in the House Judiciary Committee report does not raise the issue of the first amendment and demonstrations because that had been taken care of in the Senate. His objections were to its applications beyond organized crime.

The union, in short, no longer feared that RICO might be used against demonstrations.

All of us who were closely involved in the drafting of legislation, even those who opposed it, believed that, because of the changes I made at Senator McClellan's direction, RICO posed no danger to demonstrations, even when they exceeded first-amendment-protected activity.

Had anyone suggested that the bill might go that far, say, to effect labor strikes, I know what would have happened to it. The bill would have been referred, not only to the Judiciary Committee, where I worked under Senator McClellan, but to the Labor Committee, which would have had joint jurisdiction over it, and it would never have seen the light of day. Nor would McClellan have sponsored nor, frankly, would I have been involved in drafting it.

Mr. Scheidler will, of course, appeal the Chicago verdict attacking the lower court's unwise expansion of the concept of extortion. The Times editorial thought that the jury verdict against Scheidler had been "handled with great care." In fact, the jury, contrary to the *NAACP* v. *Claiborne,* was not required by the judge to act with the kind of precision of regulation and to differentiate who did what to whom and to segregate the increased securities cost attributable to lawful as opposed to unlawful conduct by Scheidler, as well as the cost related to murders, kidnapping or arson for which Scheidler and the others defendants were not responsible.

The Scheidler case does not deal with murder. It does not deal with arson. It does not deal with bombing. It is an extortion case simpliciter.

The jury returned a general lump sum, general verdict, not a special verdict, a practice that cannot be squared with the first amendment.

Until the applicability of RICO to protests is definitely decided, however, this kind of litigation will unconstitutionally chill social and political protest of all types. This hearing is not about abortion,

pro- or antiabortion. It is about the application of RICO to first amendment activities where it spills over beyond protection of first amendment.

Those who love the first amendment, and I do, and the people that I know on this committee do as well, and I am looking directly at Mr. Conyers, ought not rest so easily at night in light of what now has so wrongfully wrought. The matter before this committee should not be made matter of partisan wrangling, and that is what I heard this committee begin with. This is antiabortion, pro-life, anti-life, and off we go.

Mr. Schumer and Mr. Conyers, I would suggest that what you ought to do is turn this bill into a bipartisan effort. Support it on first amendment grounds, but insist that it go beyond the current drafts that you are looking at. The draft that I have given you includes in it a codification and extension of the constitutional protections reflected in *NAACP* v. *Claiborne*. The three principal applications of RICO to abortion clinics have simply ignored these standards, and I am referring now to the *Northwestern Women's Center* v. *McMonagle* in the third circuit, the *Palmetto State Medical Center* v. *Operation Rescue* in the fourth circuit, and *NOW* v. *Scheidler*. Those are three appellate cases that ignore the implications of the first amendment in the application of RICO to abortion protest.

Go beyond just adding the first amendment limitations in and end the limitation in RICO "to injury to business or property." Include under RICO personal injury, so that it would give to those people who are victimized by personal injury a RICO claim for relief. Give to future, God forbid, nurses or security guards at clinics or elsewhere a claim for relief under RICO.

What you have to do is modify, not eliminate, the definition of extortion. Separate out extortion from coercion. The problem is extortion defined as coercion. Coercion is an interference with autonomy. Extortion classically was a seizing of property.

I heard the Justice Department's testimony. All of the cases involving labor unions have involved an effort by the labor union being dominated by the mob to obtain property from employers or the mob to obtain from union members, not to eliminate it, but to obtain from them, the right to exercise the labor union power themselves. They are not coercion cases; they are extortion cases.

Justice has no reason to oppose the kind of change that I suggested. Get coercion out. It is an extension of the statute beyond its original intent, and you can do that by defining extortion and defining it properly in civil and criminal cases, and guarantee when the statute is applied even properly to murder, arson and kidnapping, it can be done so that the people responsible for the crimes, not just demonstrating, be held responsible for only what they do, as the Supreme Court indicated in *NAACP* v. *Claiborne*. That is a bill that is not Democratic. It is not Republican. It is not pro or anti-life. It is just good common sense and it reflects fidelity to the first amendment.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you, Professor Blakey, for that incisive presentation.

[The prepared statement of Mr. Blakey follows:]

PREPARED STATEMENT OF G. ROBERT BLAKEY, ESQ., PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL

DISCLOSURE STATEMENT

Consistent with House Rule XI, I have no disclosure to make of a federal grant, contract, or subcontract to me or any entity in connection with my activities at the Notre Dame Law School. Needless to say, the University of Notre Dame itself may be the recipient of unrelated federal grants, contracts or subcontracts of which I am unaware.

SUMMARY

In 1970, Congress passed the Racketeer Influenced and Corrupt Organization Act. The legislative history of the Act shows that Congress did not intent that the statute be used to chill First Amendment protected activities. Court decisions now extend "extortion" within the statute beyond its common law meaning of "to get" to mean "to deprive". Those decisions should be reversed. In addition, legislative guidelines need to be set consistent within the First Amendment to assure that any litigation brought where First Amendment protected activity is present is tried consistent with that Amendment.

STATEMENT

Should RICO, the federal Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. § 1961 *et.seq*), be applied beyond a John Gotti, the gangster, or Charles Keating, the savings-and-loan kingpin, to a Mahatma Gandhi or a Dr. Martin Luther King Jr., those who engage in political or social protest? I thought not when, as counsel to Sen. John McClellan, D- Ark., RICO's chief sponsor in the Senate, I drafted the 1970 act. I also advocated as much before the Supreme Court in 1994, when I argued in behalf of the respondents in *NOW* v. *Scheidler*, 510 U.S. 249 (1994). My arguments, however, failed to persuade the Court. The untoward consequences of the Court's decision are now playing out in Chicago, where a jury just returned a civil verdict for $85,926 under RICO against Scheidler and two others, a verdict mistakenly applauded in an editorial by the *New York Times* on April 23, 1998, col 1, p.A20.

On April 11, 1986, three ministers and Joseph Scheidler, a former Benedictine monk, went to the Delaware Women's Health Organization in Wilmington, Delaware, to tell Cathy Connor, its administrator, that they would be demonstrating at the clinic the next day. Assuming from her Irish surname that Connor was a fallen away Catholic, Scheidler warned her, "Get out of the abortion business. Someday you will have to answer to Almighty God, who has a commandment: 'Thou shall not kill.'" To be sure, his comments were a "threat" of sorts, but hardly of this world, unless you are prepared to make God a coconspirator in an illicit plot. Following the protest, Scheidler was arrested, found guilty of second-degree trespass, not guilty of harassment, and was given a small fine, but commended by the judge for his non-violent approach. In the spring of 1987, Connor left her job with the clinic. The Chicago verdict is radically rewriting the 1986 result, a rewriting that does not bode well for free speech in America.

Not satisfied with the normal outcome of criminal process, the clinic, along with another from Milwaukee and the National Organization for Women, in a strategy devised by Ms. Patricia Ireland, then a Miami litigator, filed suit in federal court in Chicago, Illinois, under RICO. Scheidler was accused of masterminding a criminal conspiracy to shut down all abortion clinics in the United States. In particular, Scheidler was accused of threatening Connor and causing her to give up her job as part of that national conspiracy. The two abortion clinics sought an injunction, treble damages and attorneys fees, as RICO properly authorized against mobsters or swindlers. The target of the suit: all persons and organizations that demonstrate and allegedly commit acts of trespass and vandalism at clinics. (The suit also charged a conspiracy to murder, to kidnap, and to commit arson, charges that the federal judge in Chicago was to later dismiss as totally lacking in evidence.) The clinics alleged that the demonstrations constituted "extortion" because they "threatened" employees, doctors and patients "to give up" participating in or having abortions.

The District Court dismissed NOW's suit, explaining that "an economic motive [had to be charged, that is,] . . . some profit-generating purpose . . . [had to] be alleged in order to state a RICO claim." 765 F.Supp 937, 941 (N.D.Il. 1991). The Seventh Circuit Court of Appeals in Chicago affirmed. 968 F.2d 613 (7th Cir. 1992). The Supreme Court granted review and reversed, holding that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeer-

ing were motivated by an economic purpose. 510 U.S. 249 (1994). The Court, however, declined to address First Amendment issues relating to the proper construction of RICO or to consider the scope of "extortion" as applied to demonstrations, though I vigorously argued both points. It left those issues until another day. 510 U.S. at 253 n2 and 262 n6. Sadly, that day is now upon us.

Congress enacted RICO as Title IX of the organized Crime Control Act of 1970; it was drafted to deal with "enterprise criminality," that is, patterns of specified kinds of violence (such as murder, extortion, arson and the like), the provision of illegal goods and services (such as gambling, drugs and prostitution), corruption in labor or management relations or in federal or state governments, and commercial fraud by, through or against various types of licit or illicit organizations—in the "upper-world" or the underworld. On the criminal side, RICO authorizes up to 20 years' imprisonment—or life imprisonment if death occurs—substantial fines, and comprehensive criminal forfeitures; on the civil side, it authorizes governmental injunctive relief, private suits for injunctions, treble damages, and attorneys fees.

At first, the Department of Justice moved slowly to use RICO. Today, it is the prosecutor's tool of choice against sophisticated forms of crime. Roughly 39 percent of the Department's criminal prosecutions under RICO concern organized crime, while 48 percent concern white collar crime. Thirteen percent fall into other categories, like terrorist white-hate or anti-Semitic acts. The Department is also using civil RICO actions in an effort to break the hold that organized crime has on certain unions, including the Teamsters. RICO claims in private civil litigation began appearing around 1980; they are now filed at the rate of about 65 per month—out of approximately 23,000 civil suits filed monthly in the federal courts. About 60 percent of these cases are filed in connection with other federal claims in the general area of commercial fraud.

Consistent with its current practice of avoiding broad pronouncements, the Supreme Court's opinion in *Scheidler* was narrowly focused. Because it concluded that RICO's statutory language was unambiguous, it refused to consider the legislative history that might have shed light on whether the law was intended to reach activities not economically motivated. Had the court followed the approach it followed in the year RICO was enacted—by looking to both the text and its legislative context to ascertain congressional intent, and writing broadly to explain and give guidance in future cases—the decision might well have gone the other way.

When Sen. McClellan proposed RICO in 1969, Sens. Philip Hart, D-Mich., and Edward Kennedy, D-Mass., objected to its application "beyond organized crime." They were concerned that the administration of President Richard M. Nixon would improperly use the statute against the demonstrators opposed to the Vietnam War. In particular, Kennedy pointed to the sit-ins at Army recruiting centers and draft-card burnings. The American Civil Liberties Union, too, objected, citing the "massive anti-war demonstrators at the Pentagon" and "the campus disorders which rocked Columbia University," each of which went far beyond constitutionally protected conduct. The senators deep concern was not simply to exclude from RICO constitutionally protected conduct, that could not be included in the bill in any event: They did not want RICO's severe criminal and civil sanctions to be used at all in the context of demonstrations—of any type. They focused on the breadth of state offenses that were then incorporated into the bill's definition of racketeering activity: "any act involving the danger of violence to life, limb, or property."

To meet their objections, McClellan told me to strike the generic definition and inserted a list of specific offenses. I did what I was told. No offense remotely related to trespass, vandalism or any other aspect of a civil disturbance that might stray beyond constitution limits was on the list that I drafted in the bill. "Extortion" was included, but its meaning is limited; the definition of "extortion"—"obtaining property by fear"—was first used in federal law in 1947; it was taken from New York law, drafted as part of the Field Code of 1865, which was, in turn, taken from the early English common law; it emphasized—from its earliest beginnings—"obtaining" property from someone ("to get"), not "depriving" someone of property ("to give up"). That meaning, too, was reflected in well-established New York and federal jurisprudence, of which I was fully aware as a former criminal law professor and federal prosecutor in the Kennedy Administration. I knew what I was doing. My view of "extortion", moreover, is not unique to me. See Craig M. Bradley, *Now v Schieidler: RICO meets the First Amendment*, Supreme Court Review 1994 129 (1995).

No knowledgeable statutory drafter in 1969 would have believed that "to protest" could be equated with "to extort." A world of legal difference exists, in short, between an organized-crime boss who uses a mob-dominated union to throw a picket line around a restaurant to extract an unlawful payoff from a hapless restaurateur and a college student who sits in a draft board office to protest the nation's unwise foreign policy. Similarly, such common-law offenses as "riot" ("an assemblage of

three or more persons to do an unlawful act, when such act is done in a violent or tumultuous manner") and the modern statutory offense of "coercion" ("forcing another to act against his or her will") were consciously excluded from the list of federal and state offenses to preclude any possibility that RICO might be used against social or political demonstrations.

The ACLU acknowledged in a statement inserted in the Senate debates after McClellan had me narrow the bill to respond to Kennedy's objections, with which he was in complete agreement, that RICO's provisions had been "substantially revised so as to eliminate most of the previously objectionable features." While the ACLU continued to oppose the bill on other civil-liberties grounds, the Union no longer feared that RICO might be used against demonstrators. All of us who were closely involved in drafting the legislation—even those opposing it—believed that because of the changes I made at McClellan's directions, RICO posed no danger to demonstrators, even when they exceeded First Amendment-protected activity. Had anyone suggested that the bill might go that far—say even to affect labor union strikes—I know what would have happened to it; the bill would have been referred, not only to the Judiciary Committee, where I worked under McClellan, but also to the Labor Committee, and it would have never seen the light of the day. Nor would McClellan have sponsored it. Nor would I have drafted it.

Scheidler will, of course, appeal the Chicago verdict, attacking the lower courts unwise expansion of the concept of "extortion." The *Times*' editorial thought that the jury verdict against Scheidler had been handled "with great care." In fact, the jury, contrary to *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), was not required by the judge to differentiate increased security costs attributable to lawful as opposed to unlawful conduct by Scheidler as well as costs related to murders, kidnaping, or arson for which Scheidler was not responsible. The jury returned a lump sum—a practice that cannot be squared with The First Amendment. Until the applicability of RICO to protests is definitively decided, however, this kind of litigation will unconstitutionally chill political and social protests, of all types, not just antiabortion demonstrations. The jury's verdict establishes no bright line for distinguishing when "protected picketing" crosses over into "unprotected pushing" or "protected yelling" turns into "unprotected threats." Obviously, few who desire to bring about meaningful social or political change will lightly risk their jobs, homes or pocketbooks to join a group of protesters if they may be named in a RICO suit based on "extortion", forced to submit to extensive civil discovery, and have to pay the huge attorneys fees and costs generated by aggressive litigators. Even if the protesters ultimately win, as they ought, the stakes are too high; given the vagaries of modern litigation, they might lose. Such a weapon of terror against First Amendment freedoms was not what I was told to design when I was counsel to McClellan. Had I been, I would have refused. It is a legal outrage that at the behest of NOW that the federal judiciary is rewriting RICO in a fashion that the Congress, after careful consideration, specifically refused in 1970.

Those who love the First Amendment ought not rest so easily at night in light of what NOW has so wrongly wrought. Updated April 20, 1998

BIOGRAPHY

Personal History:

Present Address: 1341 East Wayne Street, North, South Bend, IN 46615
Telephone: Office: 219–631–5717
Home: 219–232–0817
Birthdate: January 7, 1936
Birthplace: Burlington, North Carolina
Marital Status: Married, eight children

Education:

College: University of Notre Dame, Notre Dame, IN 46556
A.B. degree (with honors)
June 1957
Major: Philosophy

Law School: Notre Dame Law School, Notre Dame, IN 46556
J.D. degree, June 1960

Scholarships and Selected Awards:

Dean's List: 1955, 1956, 1957

Recipient of John J. Cavanaugh Law Scholarship, Notre Dame Law School, 1957.

Associate Editor, Law Review, 1959–60, Volume XXXV.

Rank in law school class: 2nd

Phi Beta Kappa

Order of the Coif

Employed, United States Department of Justice, Attorney General's Honor Program, 1960.

Professional Experience:
Special Attorney, Organized Crime and Racketeering section, Criminal Division, United States Department of Justice (August 1960 to June 1964).

Position:
Liaison with and direction of racket investigations by Federal Bureau of Investigation, Internal Revenue Service, and other federal investigative agencies; grand jury, trial and appellate work, legislative drafting and Congressional liaison.
(Upon leaving the Department, then Attorney General Robert F. Kennedy wrote Dean Joseph O'Meara of the Notre Dame Law School in my behalf:

> "I have personally observed Bob at the many organized crime meetings I have held in my office and have noticed that he knows his cases and subjects thoroughly and approaches his job here with imagination, thoroughness and good judgment. Because of my interest in the Organized Crime Program I have tried to staff it with the best attorneys in the Department. Bob Blakey, in my judgment, fits this description."

My immediate supervisor, Mr. William G. Hundley, Chief of the Organized Crime and Racketeering Section, wrote Dean O'Meara:

> "In my judgment, Mr. Blakey has perhaps the finest analytical mind of the some competent lawyers in this Section. He is a true legal scholar; he is diligent; he exercises sound judgment; he works well and easily with his associates and is a very fine person. I have been able to assign him some of the most important and complex cases and legal problems which we have to deal with in this section. He has executed all of these assignments in the most competent manner, exhibiting mature judgment far beyond his years.
> "Mr. Blakey at work, socially and indeed at almost all times shows such a keen interest in the law and in discussing legal problems, which he does with clarity, conciseness and with a knack of getting right to the heart of the problem, that I am certain he would make an excellent teacher of the law.")

Teaching Experience:
Assistant Professor of Law, Notre Dame Law School, June 1964; Professor since May 1967; on academic leave, January, 1969 to January 1971.
Professor of Law, Cornell University Law School, August 1973 to July 1980.
Professor of Law, Notre Dame Law School, August 1980.
William J. and Dorothy O'Neill Professor of Law, October, 1985.

Subjects and Activities:
Criminal Law and Procedure
Trial Technique
Seminar on Organized Crime
Federal Criminal Law
Federal Criminal Procedure
Codification
Jurisprudence

Selected Consultantships:
Special Consultant on Organized Crime, President's Commission for Law Enforcement and Administration of Justice (1966–67).
(Mr. James Vorenberg, now professor of law at the Harvard Law School, then Executive Director of the President's Crime Commission, wrote Dean O'Meara at the time of my appointment as full professor:

> "As you probably know, Professor Blakey served as a consultant to this Commission's Organized Crime Task Force, particularly on the problems relating to electronic surveillance. He did an excellent job in carrying out the assignment he was given by the Task Force. His memorandum of a proposed statutory formulation is clear, powerful and imaginative exposition. Both on the basis of this memorandum and my many dealings with Professor Blakey in the last six months, I have been most favorably impressed by his ability and insight.")

Reporter, American Bar Association Project for Minimum Standards in Criminal Justice, Electronic Surveillance (1967–68).

Special consultant, Judiciary Committee, United States Senate, Title III, P.L. 90–351 "Omnibus Crime Control and Safe Streets Act of 1968." (1967–68)

(Senator John L. McClellan, in May of 1968, wrote me in reference to the passage of the Omnibus Crime Control and Safe Streets Act of 1968:

> "The adoption of Title III (on electronic surveillance) by a vote of 68–12 was most gratifying to all who worked with us, and was due in no small measure to the tremendous contribution which you made. Your preliminary work in helping to draft Title III and your sound advice, counsel, and assistance, both in committee and on the floor of the Senate during our deliberations on the bill, proved invaluable.")

Special Consultant, National Commission on the Reform of the Federal Penal Law (1968) (conspiracy).

Counsel before the United States Supreme Court, *Berger* v. *New York*, 388 U.S. 44 (1967), for the Attorneys General of Massachusetts and Oregon and the National District Attorneys Association as Amici.

Member, National Commission on the Review of Federal and State Law Relating to Wiretapping and Electronic Surveillance, 1974–75.

Member, Task Force on Legalized Gambling, Twentieth Century Fund, 1974.

Special Consultant, Commission on the Review of National Policy Toward Gambling, 1974–75.

Member, Task Force on Organized Crime, National Advisory Committee on Criminal Justice Standards and Goals, 1976.

Counsel before the United States Supreme Court, *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), for the Attorneys General of a number of States amici.

Counsel for Amicus before the United States Court. *Agency Holding Co.*, 483 U.S. 143 (1987).

Counsel before the United States Supreme Court, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1988), for the National Association of District Attorneys as amicus.

Counsel before the United States Supreme Court, *H. J., Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), for the Attorneys General of a number of States as amici.

Counsel for Amicus before the United States Supreme Court, *Tafflin* v. *Levitt*, 493 U.S. 455 (1989).

Counsel before the United States Supreme Court, *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

Counsel for Amicus before the United States Supreme Court, *Reves* v. *Ernest & Young*, 507 U.S. 170 (1993).

Counsel before the United States Supreme Court, *NOW* v. *Scheidler*, 510 U.S. 249 (1994).

Legislative Experience:

Chief Counsel, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate (January 1969 to September 1973). (Chairman: Senator John L. McClellan).

Chief Counsel and Staff Director, House Select Committee on Assassinations, U. S. House of Representatives (June 1977 to April 1979). (Chairman: Congressman Louis Stokes).

Special Staff Counsel, Judiciary Committee, United States Senate (June, 1985 to December, 1986). (Ranking Minority Member: Joseph R. Biden, Jr.)

Consultant, Judiciary Committee, United States House of Representatives (December, 1987 to December, 1988).

Major Legislation and Activities of Subcommittee on Criminal Laws and Procedures:

P.L. 91–39, "National Commission on Reform of Federal Criminal Laws" (1969).

P.L. 91–452, "Organized Crime Control Act of 1970" (1970).

P.L. 91–664, "Omnibus Crime Control Act of 1970" (1970).

Hearings on recommendations of the National Commission on the Reform of Federal Criminal Laws (1971–72).

Introduction in the Senate of S.1, "The Codification, Revision and Reform Act of 1973."

P.L. 93–83, "Crime Control Act of 1973" (1973).

Additional Legislation

18 U.S.C. § 1346 (*McNally* v. *United States*, 483 U.S. 350 (1987) set aside).

P.L. 102–526, "President John F. Kennedy Assassination Records Collection Act of 1992" (1992).

Selected Publications:

"Welfare and Pension Plans Disclosure Act Amendments of 1962," 38 *Notre Dame Law*, 263 (1963).

"The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California" 112 *U. of Pa. Law Rev.* 499 (1964).

"Sex Pornography and Justice," 41 *Notre Dame Law* 1055 (1966).

"Aspects of the Evidence Gathering Process in Organized Crime Cases," 80 *Task Force Report: Organized Crime*, President's Commission on Law Enforcement and Administration of Justice (1967).

"Local Law Enforcement Response to the Challenge of Organized Crime Cases, President's Commission of Law Enforcement and Administration of Justice" (1967) (Restricted Publication).

"A Proposed State Electronic Surveillance Control Act," 43 *Notre Dame Law*, 657 (1968) (with Hancock).

"The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?" 46 *Notre Dame Law* 55 (1970) (with McClellan).

"Codification Reform and Revision: The Challenge of a Modern Federal Criminal Code," 1971 *Duke Law Journal* 663 (with McClellan).

"Criminal Redistribution of Stolen Property: The Need for Law Reform," 74 *Mich. Law Rev.* 1511 (1976) (with Goldsmith).

"The Federal Law of Gambling," 63 *Cornell Law Rev.* 923 (1978) (with Kurland).

"Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies," 53 *Temple Law Quarterly* 1009 (1980) (with Gettings).

"The RICO Civil Fraud Action in Context: Reflections on *Bennett* v. *Berg*," 58 *Notre Dame Law Rev.* 237 (1982).

"Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling," 16 *Rutgers Law Journal* 211 (1985).

"Equitable Relief Under Civil RICO: Reflection on *Religious Technology Center* v. *Wallersheim:* Will Civil RICO Be Effective Only Against White-Collar Crime?", 62 *Notre Dame L. Rev.* 526 (1987) (with Cessar).

"An Analysis of The Myths That Bolster Efforts to Rewrite RICO and The Various Proposals For Reform: "Mother of God—Is This The End of RICO?", 43 *Vand. L. Rev.* 851 (1990) (with Perry).

"Reflections on *Reves* v. *Ernst & Young:* Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and conspiracy Liability Under RICO," 33 *Am. Crim. Law Rev.* 1345 (1996) (with Roddy) (Special 25th Anniversary Issue).

The Development of the Law of Gambling: 1776–1976 (NILE, 1978).

Racket Bureaus: Investigation and Prosecution of Organized Crime (NILE, 1978) (with Goldstock and Rogovin).

Perspectives on the Investigation of Organized Crime, 3 vols. (1980).

The Plot to Kill the President (Times Books: New York, 1981) (with Billings) (reprinted as Fatal Hour (Berkely 1992)).

Bar and Professional Membership:

North Carolina 1960
District of Columbia 1960
United States Supreme Court 1963

105TH CONGRESS
2ND SESSION

H.R. _____

IN THE HOUSE OF REPRESENTATIVES

[INSERT DATE]

Mr. or Ms. [insert sponsor(s)] introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 96 (relating to racketeer influenced and corrupt organizations) of title 18, United States Code and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION I. SHORT TITLE.

This Act may be cited as the "First Amendment Freedoms Act of 1998."

SEC. 2. RICO AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) by striking in paragraph (1) (A) "or threat involving" and inserting in lieu theirof "constituting a conspiracy, an endeavor, or the commission of" and

(2) by adding immediately before the ";" at the end there of the following—

"*provided* that, as incorporated herein, in paragraph (A) and in paragraph (B), sections 1951, 1952, 1956 and 1957 of 18, United States Code, 'extortion' is limited, in addition to any element otherwise required by law, to the trespatory taking of property (tangible or intangible) of another, either for oneself or another".

SEC. 3. FIRST AMENDMENT DEMONSTRATIONS; PLEADING, DISCOVERY; EVIDENCE; APPEALS.

(a) Rule 9 of the Federal Rules of Civil Procedure is amended by adding at the end there of—

"(i) Constitutionally Protected Conduct. In any civil action or proceeding involving conduct that includes the protected exercise of freedom of religion, speech, press, peaceable assembly, or petition of government for redress of grievance, any averment of unprotected conduct of any natural person, its proximate consequences, the association, if any, of any natural person with another, the unlawful objective, if any, of the association, the state of mind of any natural person with regard to an unlawful objective of the association, and the evidence on which the averment of state of mind is based shall be stated, insofar as practicable, with particularity."

(b) Rule 26 of the Federal Rules of Civil Procedure is amended by adding at the end thereof—

"(h) Discovery may not be obtained that unduly interferes with the protected exercise of freedom of religion, speech, press, or peaceable assembly, or petition of government for redress of grievance."

(c) Rule 403 of the Federal Rules of Evidence is amended by—

(1) inserting before "Although"—

"(a)", and

(2) adding at the end thereof—

"(b) Evidence may not be admitted that would unduly interfere with or unduly put in issue the protected exercise of freedom of religion, speech, press, or peaceable assembly, or petition of government for redress of grievance.".

(d) Section 1292(a) of title 28, United States Code, is amended—

(1) by striking the "." at the end of paragraph (3) and inserting—

";", and

(2) by adding after paragraph (3) the following—

"(4) Interlocutory orders of the district courts of the United States granting or enforcing discovery or admitting evidence that is claimed to unduly interfere with or unduly put in issue the protected exercise of freedom of religion, speech, press, or peaceable assembly, or petition of government for redress of grievance.".

SEC. 4 FIRST AMENDMENT DEMONSTRATIONS; LIABILITY LIMITATIONS.

(a) Part VI. Particular Proceedings of title 28, United States Code, is amended by inserting at the end thereof the following new chapter—

"Chapter 181. First Amendment Demonstrations and Related Litigation Limitations.

"Section 4001. First Amendment Demonstrations and Related Litigation.

"§ 4001. First Amendment Demonstrations and Related Litigation.

(a) In any civil action or proceeding that involves conduct consisting of the protected exercise of freedom of religion, speech, press, or peaceable assembly, or petition of government for redress of grievance—

"(1) no natural person may be held liable in damages or for other relief—

"(i) for the consequences of his protected conduct, or

"(ii) for the consequences of his unprotected conduct,

except for those consequences established by clear and convincing evidence to be proximately caused by his unprotected conduct,

"(2) no natural person may be held liable in damages or for other relief because of his associations with another where another engages in unlawful con-

duct, unless it is established by clear and convincing evidence that the natural person intended, through his associations with the other proximately to cause or further the unlawful conduct;

"(3) no natural person may be held liable in damages or for other relief based on the conduct of another, unless the fact finder finds by clear and convincing evidence that the natural person authorized, requested, commanded, ratified, or recklessly tolerated the unlawful conduct of the other;

"(4) no natural person may be held liable in damages or for other relief, unless the fact finder makes particularized findings sufficient to permit full and complete review of the record, if any, of the conduct of the natural person; and

(5) notwithstanding any other provision of law authorizing the recovery of costs, including attorney fees, the court may not award costs, including attorney fees, if such award would be unjust because of special circumstances, including the relevant disparate economic position of the parties or the disproportionate amount of the costs, including attorney fees, to the nature of the damage or other relief obtained.

(b) For the purpose of this section, a natural person acts recklessly when he consciously disregards a substantial and unjustifiable risk, where his conduct is a gross deviation from the standard of conduct that a law-abiding natural person would observe in the situation of the natural person.".

(2) The Table of Chapter Headings and the beginning of title 28, United States Code, is amended by inserting immediately after the entry for chapter 181 the following—

"181. First Amendment Demonstrations and Related Litigation."

SEC. 5. SEPARABILITY.

If the provisions of any part of this Act, or the application thereof, to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

SEC. 5 EFFECTIVE DATE.

(a) Except as provided in subsections (b) and (c) of this section, this Act shall be effective on enactment.

(b) The amendments made to Section 1961 of title 18, United States Code, insofar as they are incorporated into Section 1963 of title 18, United States Code, shall not be applicable conduct engaged in prior to the effective date of this Act.

(c) The amendments made to Section 1961 of Title 18, United States code, insofar as they are incorporated into Section 1964 of title 18, United States Code shall be applicable to conduct prior to and after the effective date of this Act unless such prior conduct has been the subject of a final judgment by a court of competent jurisdiction, where all avenues of appellate review have been fully exhausted.

COMMENT ON THE FIRST AMENDMENT FREEDOMS ACT OF 1998

Section 1. creates a short title.

Section 2. amends RICO (18 U.S.C. §1961 *et. seq.*) to clarify the scope of "extortion" in the state and federal offenses incorporated as "racketeering activity" under 18 U.S.C. §1961. Decisions of federal courts have conflated the common law offense of "extortion" ("obtaining property by fear"), an offense, like larceny and robbery, that focuses on the protection of property, and requires a trespatory taking, with the modern statutory offense of "coercion" ("forcing a person to act against his or her will"), an offense that focuses on the protection of autonomy, and does not require a trespatory taking, by interpreting "to obtain" to mean "to deprive".

This construction makes possible the improper use of RICO against social and political demonstrations, where they, in fact, exceed constitutional protections by minor acts of trespass or vandalism, or petty assault. *See, e.g., Northeastern Women's Center* v. *McMonagle*, 868 F.2d 1342, 1349–50 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989); *National Organization For Women, Inc. et. al.* v. *Joseph M. Scheidler*, 1997 U.S. Dist. Lexis 14854 *55–67 (N.D. Ill. 1997). This result is contrary to the carefully crafted compromises that were embodied in RICO in 1970 by the Congress. *See generally* 33 Am. Crim. L. Rev. 1657–1675 (Appendix H (Extortion) (tracing the legislative history of the Act and its constitutional and common law background). Section 2 restores the law to its common law scope before these innovative views were adopted.

Section 3 requires particularity of pleading, limits discovery, circumscribes the admission of evidence, and provides for interlocutory appeal when First Amendments freedoms are enmeshed in litigation.

Section 4. codifies and extends the First Amendment limitations reflected in *NAACP* v. *Claiborne* 458 U.S. 886, 918–21 (1981) (any group sued and each individual member of it must be shown to possess a purpose to engage in unlawful activity, not engage in lawful activity, and only those damages that are proximately caused by the unlawful conduct, not the lawful conduct, may be remedied); it also raises the burden of persuasion in such matters from preponderance to clear and convincing evidence and limits the recovery of attorneys fees that would be unjust in the circumstances.

Section 5. provides for separability.

Section 6 provides that the effective date is on enactment. The provisions that amend RICO, however, are, while limited for criminal purposes to conduct *after* the effective date, apply for civil purposes to conduct *before* the effective date that is not yet the subject of a final judgment on which all avenues of appellate review have been exhausted.

Congress is, of course, free, consistent with Due Process, to modify statutorily created rights imposing liability by extinguishing that liability, even after conduct in violation of that standard has occurred, particularly where the legislation is curative of judicial interpretation of congressional intent. *See, e.g., Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2nd Cir. 1948) (upholding the Portal-to-Portal Act of 1947, which curtailed the scope of liability unexpected by imposed under the Fair Labor Standards Act in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)), cert. denied, 335 U.S. 887 (1948) (collecting Supreme Court decisions). *Accord, Hammong* v. *United States*, 786 F.2d 8, 10–12 (1st Cir. 1986) (upholding 42 U.S.C. § 2212, which curtailed pending and future common law and state statutory claims for radiation injury.) (collecting Supreme Court decisions) The cases upholding such legislation are legion.

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APPENDIX H (EXTORTION)

In *NOW v. Scheidler*,[1] respondents raised two issues: (1) the scope of "enterprise" in RICO beyond "economic motive" and (2) the scope of the Hobbs Act[2] "extortion" beyond "obtaining property." The Court did not reach the Hobbs Act issue, and it expressed "no opinion upon it."[3] A series of courts of appeals decisions, however, extends "extortion" in the Hobbs Act beyond its common law roots of obtaining property.[4] In brief, that extension conflates "extortion" (obtaining property for self or another) with "coercion" (requiring another to do or not do something). Extortion protects property; coercion protects autonomy. While the concepts may overlap, they are distinguishable; and the distinction animates general criminal jurisprudence. That extension is also commonly reflected in dicta in other Hobbs Act decisions.[5] The extension is unjustified and unjustifiable. It raises significant implications for litigation involving First Amendment activities and commercial relations. It is inconsistent with principles of statutory construction, including the plain meaning rule, the rule for construing legislative text borrowed from another jurisdiction, the rule for interpreting common terms, the rule of lenity, and First Amendment considerations.

1. *Text of Hobbs Act:* Title 18 U.S.C. § 1951(a) (1994), in relevant part, provides: "(a) Whoever obstructs, . . . by . . . extortion or attempts or conspires so to do, . . . shall be imprisoned not more than twenty years, or both."

Title 18 U.S.C. § 1951(b)(2) (1994), in relevant part, provides: "The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

2. *Plain Meaning*: Statutory interpretation begins with text.[6] Words are to be given their ordinary meaning.[7] The ordinary meaning of "obtaining. . .from" is

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1. 114 S. Ct. 798 (1994).
2. 18 U.S.C. § 1951(a)(1994).
3. 114 S. Ct. at 801-02.
4. Libertad v. Welch, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (citing *Northwest Women Center, Inc.*); NOW v. Scheidler, 968 F.2d 612, 629-30 n.17 (7th Cir. 1992) *aff'd on other grounds*, 114 S. Ct. 798 (1994); Northwest Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1350 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989). One of our member (Blakey) was a counsel for petitioners on certiorari in *Northeast Women Center* and respondents in *NOW*.
5. *See, e.g.*, United States v. Stillo, 37 F.3d 553, 559 (7th Cir. 1995) ("[A]n extortionist can violate the Hobbs Act without extra seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required") (citing United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986) (attempted extortion; extortion illustration involving destruction, not obtaining), *cert. denied*, 479 U.S. 1093 (1987))); United States v. Frazier, 560 F.2d 884, 887 8th Cir. 1977) (attempted extortion; gravamen of extortion said to be "loss to victim") *cert. denied* 435 U.S. 968 (1978); United States v. Hyde, 448 F.2d 815, 843 (5th Cir. 1971) (extortion; stock sold to third party; gravamen of extortion said to be "loss to victim," not obtaining perpetrator or third party) *cert denied*, 404 U.S. 1058 (1972).
6. United States v. Turkette, 452 U.S. 576, 580 (1981).
7. Russello v. United States, 464 U.S. 16, 32 (1983).

"get."[8] Its principal usage in the English language is to "come into possession or enjoyment of [something]. . .to acquire [or] get."[9] "Obtaining. . .from" is not synonymous with "to part with," which means "to let go, give up [or] surrender."[10]

3. *Text Borrowed by Legislature:* When a legislature borrows language of a statute from the jurisprudence of another jurisdiction, the language must be construed in the sense in which the other jurisdiction used it.[11]

The Hobbs Act took its definition of "extortion" from New York law.[12] New York law was codified in the Field Code of 1865, which defined extortion as "[t]he *obtaining of property* from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."[13] In the commentary to Chapter IV § 584 (larceny), the Field Code Commissioners observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement. . . . *All four include the criminal acquisition of the property of another.* . . . In extortion, there is again a taking. . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.[14]

New York jurisprudence requires a "taking" for extortion."[15] "Depriving"

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8. 10 THE OXFORD ENGLISH DICTIONARY 669-70 (2d ed. 1983).

9. *Id.*

10. 11 THE OXFORD ENGLISH DICTIONARY 262 (2d ed. 1983).

11. *See, e.g.*, Metropolitan R.R. Co. v. Moore, 121 U.S. 558, 572 (1887) ("construed in the sense in which they were understood at the time in that system from which they were taken"); Willis v. Eastern Trust & Banking Co., 169 U.S. 295, 307-08 (1887) (same).

12. Evans v. United States, 112 S. Ct. 1881, 1886 n.9, 1887 (1992); United States v. Enmons, 410 U.S. 396, 406 n.16 (1973). The relevant legislative materials are ably reviewed in *United States v. Mazzie*, 521 F.2d 639, 651-55 (3rd Cir.) (Gibbons, J. in dissent), *cert. denied*, 423 U.S. 1014 (1975).

13. PENAL CODE OF THE STATE OF NEW YORK, REPORTED COMPLETE BY THE COMMISSIONERS OF THE CODE § 613 p.220 (1865) (emphasis added).

14. *Id.* § 584 at 210-11 (emphasis added).

15. *Enmons*, 410 U.S. at 406 n.16 (under New York law, "extortion requires an intent to *obtain* that which in justice and equity the party is not entitled to receive"; accused must be "actuated by the purpose of *obtaining a financial benefit*" such as "receiv[ing] a payoff") (emphasis added; quoting and citing New York cases). *See, e.g.*, People v. Whaley, 6 Cow. 661, 663 (N.Y. 1827) ("[e]xtortion . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865 § 613 (extortion)); People v. Ryan, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent "to extort" requires an accompanying intent to "gain money or property"; mere threat to injure a business is insufficient); People v. Squillante, 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) (" '[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something"). *Compare* People v. Griffin, 2 Barb 427, 430 (N.Y. 1848) ("intent to extort" interpreted, as in a robbery-type offense, to mean "to obtain that which in justice and equity the party is not entitled to receive," that is, "*lucri causa*"), with People v. Barondess, 61 Hun 571, 575-76 (N.Y. 1891) 133 N.Y. 649, 653-54 (1892) ("At common law, extortion. . .was defined to be the taking of money. . . . [As codified, it] completes the legislation against robbery. . . ."), *rev'd on other grounds*, 133 N.Y. 649 (1892). California extortion law is also derived from the Field Code. Similar comments appear in the COMMENTARY TO THE PENAL CODE OF 1870, Chapter VI, § 371 (embezzlement). Extortion is defined in § 383; its commentary, as in the Field Code in New York, is cross referenced to § 371. *See also* People v. Anderson, 95 Cal. 408, 415-16, 211 P.257, 261-62 (1922) (the taking in robbery and extortion distinguished); People v. Peck, 43 Cal. 638, 639-40, 185 P. 881, 882-83 (1919) (the taking in robbery and extortion distinguished).

another of property is not "extortion." That, too, is how the Hobbs Act should be read.

4. *Definition of Extortion at Common Law and in Modern Statutes:* A "statutory term is generally presumed to have its common law meaning."[16] That rule is followed unless the term is obsolete, or inconsistent with the statute's purpose.[17] The rule informs the Supreme Courts reading of "extortion" in the Hobbs Act.[18]

a. *Common Law "Extortion":* While the common law definition of "extortion" varies from treatise to treatise, "extortion" was a *property* offense. Blackstone[19] described extortion as:

> an abuse of public justice which consists in an officer's unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due to him, or more than is due or before it is due.[20]

Another influential treatise writer, Lord Coke, observed:

> [e]xtortion, in its proper sense, is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing*... either that is not due, or more than is due, or before it be due....[21]

Hawkins, too, took a similar stand:

> extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.[22]

Unquestionably, the common law definition of extortion required the *acquisition of property*, a "taking," not a "*depriving*."

b. *Statutory "Extortion:"*

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16. Taylor v. United States, 495 U.S. 575, 592 (1990) ("burglary"); United States v. Turley, 352 U.S. 407, 711 (1957) ("steal"); Morissette v. United States, 342 U.S. 246, 263 (1952) ("where Congress borrows terms of art... it is presumably knows and adopts the cluster of ideas that were attached to each borrowed word").

17. *Taylor* 495 U.S. at 594 (citing Perrin v. United States, 444 U.S. 37, 45 (1979) (§ 8 U.S.C. § 1952 ("bribery"); United States v. Nardello, 393 U.S. 286, 289-96 (1969) (18 U.S.C. § 1952 ("extortion"); Bell v. United States, 462 U.S. 356, 362 (1983) (18 U.S.C. § 2113 ("robbery")).

18. *Evans*, 112 S. Ct. 1881, 1885-89 (quoting *Morissette*, 342 U.S. at 263).

19. "The definition of common law extortion that writers on the Hobbs Act most frequently cite is Blackstone's...." James Lindgren, *The Elusive Distinction Between Bribery and Extortion: from the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 862 (1988).

20. 4 WILLIAM BLACKSTONE, COMMENTARIES 141 (1769) (emphasis added). Case law agrees. *See, e.g.*, Rex v. Burdett, [1792] 1 Ld. Raym. 149, 150, 91 Eng. Rep. 996, 997 (it is not the injury to "free liberty to sell their wares in the market" or "the extortive agreement... [that] is.... the offense, but the taking....").

21. 3 EDWARD COKE, FIRST INSTITUTE 584 (J. Thomas ed. 1826) (emphasis added).

22. WILLIAM HAWKINS, A TREATISE OF THE PLEASE OF THE CROWN 316 (6th ed. 1788) (emphasis added). "Hawkin's definition of extortion was cited, paraphrased, or followed by the Crown Circuit Companion, Mathew Bacon in A New Abridgement of the Law, William Russell in A Treatise on Crimes and Misdemeanors, and Francis Wharton in his influential American treatise, A Treatise on the Criminal Law." Lindgren, *supra* APPENDIX H note 19 at 865 (footnotes omitted).

Appropriately, the Model Penal Code, promulgated in 1962, maintains the distinction between the (originally common-law) crime of "extortion" and the (originally statutory) crime of "coercion." Section 212.5 "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment."[23] Section 223.4, however, "deals with situations where threat . . . is the method employed to *deprive the victim of his property*."[24] The obtaining of property distinguishes extortion from coercion as coercion involves the restriction of another's freedom of action by threat.

Many states follow the Model Penal Code and distinguish "extortion" and "coercion" by categorizing them as separate statutory offenses.[25] A second group of states recognize only the crime of "extortion," not "coercion."[26] Other states combine the two offenses under one heading.[27] "The distinction is not trivial: . . .it is of the essence of extortion—not only in New York law, but more importantly, in the law generally—that one compel another to surrender property."[28] In brief, "coercion" was unknown to the common law.[29] Since the Model Penal Code, moreover, the distinction between "extortion," a common law offense, and

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23. MODEL PENAL CODE AND COMMENTARIES § 212.5 at 264 (1980) (emphasis added).

24. *Id.* § 223.4 at 201 (emphasis added).

25. ALA. CODE §§ 13A-8-13, 13A-6-25 (1982); ALASKA STAT. §§ 11.41.520, 11.41.530 (1989); ARK. CODE ANN. §§ 5-36-103(a)(2), 5-13-208 (Michie 1987 & Supp. 1991); COLO. REV. STAT. ANN. § 18-3-207 (coercion labelled extortion), § 18-4-401 (consolidated theft) (West 1990); DEL. CODE ANN. tit 11, §§ 846, 791 (Supp. 1992); MISS. CODE ANN. § 97-3-81 (extortion labelled robbery), § 97-3-87 (coercion labelled whitecapping) (1973); MONT. CODE ANN. §§ 45-6-301(2), 45-5-203 (1991); NEV. REV. STAT. ANN. §§ 205.320, 207.190 (Michie 1992); N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5 (West 1982); N.Y. PENAL LAW §§ 155.05(2)(e) (McKinney 1988), 135.60 (McKinney 1987); N.D. CENT CODE §§ 12.1-23-02(2), 12.1-17-06 (1985); OHIO REV. CODE ANN. §§ 2905.11, 2905.12 (Anderson 1993); OR. REV. STAT. §§ 164.075, 163.275 (1990); 18 PA. CONS. STAT. ANN. §§ 3923, 2906 (Purdon 1983); WASH. REV. CODE ANN. §§ 9A.56.110, 9A.36.070 (1988).

26. ARIZ. REV. STAT. ANN. § 13-1804 (1989); CAL. PENAL CODE § 518 (1988); CONN. GEN. STAT. ANN. § 53a-119(5) (West Supp. 1993); GA. CODE ANN. § 16-8-16 (1992); IDAHO CODE § 18-2403(2)(e)(1987); ILL. ANN. STAT. ch. 38, para. 16-1(a)(3)(Smith-Hurd Supp. 1992); IND. CODE ANN. §§ 35-45-2-1, 35-43-4-1(b)(7) & 35-43-4-2 (Burns Supp. 1992); IOWA CODE ANN. § 711.4 (West 1979); KY. REV. STAT. ANN. § 514.080 (Baldwin 1984 & Supp. 1992); LA. REV. STAT. ANN. § 14:66 (West 1986); ME. REV. STAT. ANN. tit. 17-A § 355 (1983); MD. CRIM. LAW CODE ANN. § 562B (1992); MO. ANN. STAT. § 570.030 (Vernon Supp. 1993); NEB. REV. STAT. § 28-513 (1989); N.H. REV. STAT. ANN. § 637:5 (1986); N.C. GEN. STAT. § 14-118.4 (1986); S.C. CODE ANN. § 16-17-640 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-30A-4 (1988); TEX. PENAL CODE ANN. § 31.03 (West 1989); UTAH CODE ANN. § 76-6-406 (1990); VA. CODE ANN. § 18.2-59 (1988); W.VA. CODE § 61-2-13 (1992).

27. *See* FLA. STAT. ANN. § 836.05 (West 1976); HAW. REV. STAT. § 707-764 (1988); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990); MICH. COMP. LAWS ANN. § 750.213 (West 1991); MINN. STAT. ANN. § 609.27 (West 1987); N.M. STAT. ANN. § 30-16-9 (1984); R.I. GEN. LAWS § 11-42-2 (Supp. 1992); TENN. CODE ANN. § 39-14-112 (1991); VT. STAT. ANN. tit. 13, § 1701 (Supp. 1992); WIS. STAT. ANN. § 943.30 (West 1982); WYO. STAT. § 6-2-402 (1988). CF. KAN. STAT. ANN. §§ 21-3701(c) (theft by threat), 21-3428 (coercion and extortion together) (1988); OKLA. STAT. ANN. tit. 21, §§ 1481 (extortion), 1488 (coercion and extortion together under blackmail) (West 1983).

28. United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 114, 1132 (E.D.N.Y. 1992) (18 U.S.C. § 1961(1)("extortion"); "coercion" not "extortion:) (citing *Mandello*, 393 U.S. 286, 296 (1969); *accord*, Center Cadillac v. Bank Leumi Trust Co., 808 F. Supp. 213, 231-32 (S.D.N.Y. 1992) ("coercion. . .not among. . . laws. . .providing a basis for RICO liability"). *See also United States v. Delano*, 35 F.3d 720, 726, n.3 (7th Cir. 1995) (New York extortion requires obtaining property; it does not include theft of services; the inclusion of "coercion" in "extortion" for RICO not decided).

29. *See*, e.g., State v. Ullman, 5 Minn. 1, 2 (1861).

"coercion," a statutory innovation, remains valid.[30] Maintaining the distinction in "extortion" in the Hobbs Act is a matter of reading the statute. If the common law distinction is to be abandoned, Congress ought to have to act.[31]

5. *Lenity*: Where two constructions of a term are plausible, the basic principle of lenity requires that the narrower construction be adopted.[32] Extending "extortion" to "coercion" violates the principle of lenity.

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30. *See generally*, Sanford Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 5389 (1988):

> The Model Penal Code has become. . .the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes. . . .***The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes. . . .

THE MODEL PENAL CODE AND COMMENTARIES § 223.4 at 203 (1980) observes:

> [B]ehavior prohibited by this section [theft by extortion] is closely analogous to that proscribed as criminal coercion under Section 212.5***The major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment,' while extortion is included within the consolidated offense of theft because it is restricted to one who 'obtains property of another by' threats.

Id. at § 212.5 at 266, explains:

> It is arguable that these categories of threat [theft by extortion] should be included in the offense of criminal coercion. . . . The judgment underlying the Model Code, however, is that the underlying wrong in extortion—obtaining property to which the actor knows he is not entitled—provides a more reliable basis for punishment than does the Section 212.5 requirement of a 'purpose unlawfully to restrict another's freedom of action to his detriment.'

31. Northwestern Bell Telephone Co. v. H.J. Inc., 492 U.S. at 249 ("a job for Congress. . .not this court.") (quoting *Sedima*, 473 U.S. at 495). The point is rooted deeply in history. *See, e.g.*, CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 12-13 (Legal Classic Ed. 1991) ("Judges, in criminal cases, have no right to interpret the penal laws, because they are not legislators. . ., that is, the representatives of society, and not the judge, whose office is only to examine, if a man have, or have not committed an action contrary to the laws.") "Interpretation" in the 18th century did not necessarily have a neutral connotation. *See* VII OXFORD ENGLISH DICTIONARY 1131-32 (2nd ed. 1989). Nor does it today. *See* ROSCOE POUND, JURISPRUDENCE at 250 (1959) (distinguishing between "genuine" and "spurious" interpretation). Federalism counsels similar restrain. Rewis v. United States, 401 U.S. 808, 812 (1971) (expansive interpretation that alters sensitive federal-state relationships and taxes federal resources should be avoided); *see also* United States v. Lopez, 116 S. Ct. 1867 (1995) (federal offense to possess firearm within 1000 feet of school invalid). While RICO should be liberally construed, its predicate offenses, including extortion, must be read strictly. *See, e.g.*, Robert Saris General Contractor Corp. v. New Metropolitan Fed. S. & L. Ass'n. 873 F.2d 1401, 1405 (11th Cir. 1989) (failure to perform contract not RICO extortion); Union Nat'l Bk. v. Fed. Nat'l Morg Ass'n. 860 F.2d 847, 856-57 (8th Cir. 1988) (exercise of contract right not RICO extortion); First Pacific Bancorp Inc. v. BRO, 847 F.2d 542, 547 (9th Cir. 1988) (threat to sue not RICO extortion); I.S. Joseph Co. Inc. v. Lauritzen, 751 F.2d 265, 267 (8th Cir. 1984) (even groundless threat to sue not RICO extortion); Idea v. Adrian Buckhannon Bank, 661 F. Supp. 234, 237-39 (N.D. W.Va. 1987) (bank workout plan not RICO extortion).

32. Dowling v. United States, 473 U.S. 207, 216-18 (1984) (18 U.S. § 2314 (goods "obtained by fraud") ("[w]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogative of Congress in defining federal crime prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate.") (citing *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment.")); McNally v. United States, 383 U.S. 356, 359-60 (1987) (18 U.S.C. § 1341 ("to defraud"; "to choose the harsher only when Congress has spoken in clear and definite language") (citing United States v. Bass, 404 U.S. 336, 347 (1971)).

6. *First Amendment Considerations*: Constructions of statutes that might infringe on First Amendment freedoms should be avoided.[33] Equating demonstrations with "extortion" endangers political and religious free speech.[34] Peaceful picketing and leafletting on streets and sidewalks are expressive conduct of the highest order.[35] Even though picketing inflicts economic injury, it is not unlawful.[36] "Speech does not lose its protected character simply because it may embarrass others or coerce them into action."[37] To be sure, substantial constitutional limits are placed on civil litigation that threatens First Amendment freedoms.[38] Nevertheless, equating demonstrations—religious, political, or economic—with "extortion" does not meet the "heavy" burden demanded by the First Amendment in this sensitive area to safeguard expressive "constitutionally protected activity." "Extortion" should be left in its common law mold.

7. *Critique of Northeastern Women's Center v. McMonagle: In Northeast Women's Center v. McMonagle*,[39] the Third Circuit upheld a district court's

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33. *See, e.g.*, DeBartolo Corp. v. Fla. Gulf Coast Bldg Const., 485 U.S. 568, 574-88 (1988) (National Labor Relation Act § 8(b)(4)(ii)(B)("threaten, coerce, or restrain); *see also* City of Houston, Texas v. Hill, 482 U.S. 451, 461 (1987) (verbal challenges to activities of another); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (leafleting against discriminatory real estate practices); Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (gathering to march, sing, and chant); Edwards v. South Carolina, 372 U.S. 229 (1963) (same); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (proselytizing in public places); Lovell v. Griffin, 303 U.S. 444, 452 (1938) (distribution of literature). Legislation that would attempts to regulate such activities has to be "narrowly tailored" as to time, place and manner. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

34. *See generally* Anthonio Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 860 (1990) ("using RICO in ideological disputes is inappropriate and harmful because it results in the chilling of First Amendment Rights." Anne Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?* 56 UMKC L. REV. 287, 309-312 (1988); Nat Hentoff, *The RICO Dragnet*, THE WASHINGTON POST, May 13, 1989, at A-19, col. 1.

35. United States v. Grace, 461 U.S. 171, 176-78 (1984).

36. Organizations for a Better Austin v. Keefe, 402 U.S. 445, 418-20 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.").

37. *Claiborne Hardware*, 458 U.S. at 910; *see also id.* ("[t]o the extent that the lower court's judgment rests on the ground that 'many' black citizens were intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment"); Police Department of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972)("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Organization for a Better Austin v. Keefe, 402 U.S. 45, 419 (1971) ("[t]he claim that the expressions were intended to exercise a coercive impact on respondent [a realtor] does not remove them from the reach of the First Amendment."); Watts v. United States, 394 U.S. 705, 708 (1969) ("[t]he language of the political arena. . .is often vituperative, abusive, and inexact"); Cox v. Louisiana, 379 U.S. 536, 551-52 (1965) ("[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger") (citations omitted); New York Times v. Sullivan, 376 U.S.254, 270 (1964)("profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open").

38. *Claiborne Hardware*, 458 U.S. at 916 ("precision of regulation") (citing NAACP v Button 371 U.S. 415, 438 (1963)). Any group sued and each individual member of it must be shown to possess a purpose to engage in unlawful activity, not engage in lawful activity, and only those losses that are proximately caused by the unlawful conduct, not the lawful conduct, may be remedied. 458 U.S. at 918-21.

39. 868 F.2d 1342, 1349-50 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989).

instructions on "extortion" phrased in terms of "to part with"[40] in the context of a suit by an abortion clinic against forty two individual protestors under RICO. The conduct in question was over nine years of protest activity, consisting of demonstrations, picketing in public *fora*, chanting, leafletting, and other conduct protected by the First Amendment. RICO liability for conspiracy and attempted extortion was premised on one or more of four sit-ins; claims for relief were also brought for trespass and intentional interference with contractual relations. Based on a finding of injury in the amount of $887 to suction aspirator devices and other equipment during one sit-in by an unidentified party, defendants were held liable under RICO for treble damages and $65,000 in attorneys fees. The jury also awarded $42,000 in damages for trespass attributable to plaintiffs' increased cost of doing business as a result of defendants' protest.[41] The Third Circuit's bald assertion that the defendants proffered no point for charge on the need to prove that property was "obtained" is false.[42] The Third Circuit then cited[43] three decisions to support its innovative view: *United States v. Cerelli*,[44] *United States v. Starks*,[45] and *United States v. Anderson*.[46] None of these decisions, however, stands for the proposition that a "taking" is *not* required for an extortion. Unremarkably, *Cerelli* holds that the extortionist need not take the property himself; a political party may be the recipient of the extorted contributions.[47] *Starks* holds that a religious purpose does not preclude finding an extortion where money was, in fact, taken. Finally,

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40. 689 F. Supp. 465, 472 (E.D. Pa. 1988).

41. No effort was made under *Claiborne Hardware*, 458 U.S. at 918-21 in the District Court to apportion the increased costs between the lawful protest and the unlawful sit-ins. In fact, 72% of these expenditures were made at a location different from that at which the sit-in occurred and a portion of the remainder of which was expended at a time prior to the first of the four sit-ins. *See* McMonagle v. Northeast Women's Center, Inc., 670 F. Supp. 1300, 1308 (E.D. Pa. 1987).

42. *Compare* 868 F.2d at 1349-50, *with* McMonagle v. Northeast Women Center, Inc. No. 88-2137, October Term, 1988, United States Supreme Court, Petition for Charter, Petitioner's Appendix p.163 (Defendants Exhibit 5-5—Points for Charge on Extortion). In fact, counsel for the defendant interposed this objection:

> Mr. Stanton:
> Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extorus [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third-party and that the problem I have with this instruction. It leaves the impression if somebody surrendered that [sic] all that's necessary.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, No. 88-2137, United States Supreme Court, October Term, 1988. McMonagle v. Northeast Women's Center, Inc., at 26 n.29.

43. 868 F.2d at 1350.

44. 603 F.2d 415, 420 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

45. 515 F.2d 112, 124 (3rd Cir. 1975), *cert. denied*, 431 U.S. 651 (1977).

46. 716 F.2d 446 (7th Cir. 1983).

47. *See, e.g.*, United States v. Green, 350 U.S. 415, 418-20 (1955) (18 U.S.C. § 1951 (extortion); statutes not limited to obtaining property for personal benefit, but extends to union official who uses unlawful fear to obtain jobs and pay for union members.).

Anderson dealt not with the "obtaining from" element of "extortion," but with the failure to give "kidnapping" instructions. The record, however, included evidence that the victim, a doctor, who performed abortions, was extorted of $300. Remarkably, the Third Circuit left unmentioned its own controlling precedent, *United States v. Sweeney*,[48] which recognized that "extortion" under the Hobbs Act was a "larceny-type offense." *McMonagle*, in short, is unpersuasive. Nor should *Scheidler*[49] or *Libertad*[50] be given particular attention; they merely track the *McMonagle* result without adding independent analysis of their own of the text of the statute or its New York or common law backgrounds, much less the relevant considerations of statutory interpretation. No court of appeals or district court outside of the Third, Seventh, or First Circuits ought to feel bound to follow the tainted *McMonagle* line of decisions. District court decisions like *Private Sanitation* are well-reasoned and rightly decided; they should be followed. The Supreme Court or Congress ought to reverse *McMonagle* and its progeny; they threaten First Amendment values[51] and they raise the specter of unwisely turning commercial transactions involving "hard bargains" into "extortion" litigation under RICO.

Holmes aptly observed:

> [T]he word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention."[52]

Not every "commercial dispute" involving a "hard bargain," in short, ought—even potentially—to be elevated into a RICO violation simply by calling it "extortion." Such issues are best left to the state law of economic duress or

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48. 262 F.2d 272, 275 (3rd Cir. 1959) (citing United States v. Nedley, 255 F.2d 350 (3rd Cir. 1958)). *See also* United States v. Agnes, 753 F.2d 293, 297 (3rd Cir. 1985) (Hobbs Act taken from N.Y. law; "was to be the same"; "wrongful" not include claim-of-right).

49. 968 F.2d at 629-30 and n.17 ("The Hobbs Act. . .does not require that the defendant profit economically from the extortion") (citing Town of West Hartford v. Operation Rescue 915 F.2d 92, (2nd Cir. 1990); United States v. Anderson, 716 F.2d 446 (7th Cir. 1983); United States v. Starks, 515 F.2d 112 (3rd Cir. 1975). The Seventh Circuit missed the point: not "personal profit," but "property obtained"—by either the perpetrator or a third party. The irrelevancy of *Anderson* and *Starks* on *this* point is set out in the text; *Town of West Hartford* is similarly irrelevant; it assumed *arguendo* that the defendant's conduct constituted extortion of the clinic, but then denied the towns claim for injury to its property for extortion. 915 F.2d at 102. ("So bizarre a construction of the Hobbs Act affronts common sense, much less the rule of lenity. . . . [W]herever RICO claim the center may have. . .there is no plausible basis for its assertion by the town.").

50. 53 F.3d at 438 n.6 ("The record. . .shows. . .[defendant's] tactics include the intentional infliction of property damage, and directly result in the clinics loss of business. It is difficult to conceive of a set of facts that more clearly sets for the extortion [under the Hobbs Act]").

51. *Compare* Wurtz v. Risley, 719 F.2d 1438, 1441-42 (9th Cir. 1983) ("intimidation provision held facially overbroad), *with* State v. Ross, 269 Mont. 347, 350, 889 P.2d 161, 163 (1995) (revised and narrowed, MONT. CODE ANN § 45-5-203 (1995) intimidation statute upheld).

52. *See* Vegelahn v. Guntet, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896).

business compulsion. The Supreme Court of Wisconsin in *Wurtz v. Fleschman*[53] observed:

> [T]he basic elements of economic duress are . . .
>
> 1. The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and
>
> 2. Such act or threat must be one which deprives the victim of his unfettered will.
>
> As a direct result of [the coming together of] these elements, the party threatened must be compelled to make a disproportionate exchange of value or to give up something for nothing. If the payment or exchange is made with the hope of obtaining a gain, there is not duress; it must be made solely for the purpose of protecting the victim's business or property interests. Finally, the party threatened must have no adequate legal remedy. . . [Professor] Williston emphasizes that *merely driving a hard bargain or taking advantage of another's financial difficulty is not duress.*[54]

Economic duress or business compulsion, in fact, are not actionable in themselves; they only entitle a party to rescission.[55] Tort liability, too, for duress is predicated on *wrongful* conduct.[56] Surely, criminal or civil liability for "extortion" under the Hobbs Act and treble damages and counsel fees under RICO ought not be established by a lesser showing than that required for contract relief or general civil responsibility. If the law should be changed, then Congress ought to take that step. Congress certainly did not do it in 1970.

8. *Legislative History*: The question of abusing RICO by extending it to "coercion" comes up not only in considering the scope of the Hobbs Act, but also the scope of "extortion" in 18 U.S.C. § 1961(1)(1994). District court decisions rightly construe "extortion" to mean "extortion," not "extortion" and "coercion".[57] The senators and congressmen who drafted RICO knew the difference between "extortion" and "coercion." Had they meant to include "coercion," they would have said it.[58] Had they foreseen that courts of appeals would rewrite the Hobbs Act, they would have excluded "coercion" from it for the purposes of RICO, if not entirely. While the Supreme Court in *NOW v Scheidler* did not find the legislative history of RICO so "clearly expressed" that the Court was willing to add to statutory language it thought was "unambiguous" on the issue of

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53. 97 Wis. 2d 100, 293 N.W. 2d 155 (1980).

54. 97 Wis. 2d at 109-10, 293 N.E. 2d at 160 (emphasis added) (citations omitted).

55. RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. (1981).

56. RESTATEMENT (SECOND) OF TORTS § 871 cmt. f (1979).

57. *See* United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 114, 1132 (E.D.N.Y. 1992) (18 U.S.C. § 1961(1)("extortion"); "coercion" not "extortion:) (citing *Mardello*, 393 U.S. 286, 296 (1969); *accord*, Center Cadillac v. Bank Leumi Trust Co., 808 F. Supp. 213, 231-32 (S.D.N.Y. 1992) ("coercion. . .not among. . .laws . . .providing a basis for RICO liability").

58. *Turkette* 452 U.S. at 581 ("Had Congress. . .intended. . .[it]. . ., it could have easily. . .added the word").

"economic motive,"[59] that legislative history ought to be persuasive on the construction of "extortion" in 18 U.S.C. § 1961(1) (1994). It shows that Congress did not want RICO abused in the area of First Amendment freedoms.

a. *Approach to Legislative History:* When statutory language, syntax, or context—internal or external—is ambiguous,[60] resort to legislative history is proper.[61] Ultimately, however, the interpretation of a statute is "a holistic endeavor."[62]

The key to understanding RICO's legislative history lies in the evolution of "enterprise criminality," which, in turn, evolved against the backdrop of the Communist Party membership prosecutions in the 1950's and the Vietnam anti-war protests prosecutions in 1969-70. Nevertheless, the intent of RICO's drafters may be best understood by examining the principle of selection by which RICO's sponsors *included* and *excluded* the federal and state predicate offenses in RICO. That legislative history demonstrates that RICO's sponsors consciously focused RICO on organized crime as well as white-collar crime and that they took every opportunity to preclude its application to political or social protest.

b. *Organized Crime:* Following the Attorney General's 1950 Conference on

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59. 114 S. Ct. at 806.

60. Ambiguity is of three types: semantic, syntactical, and contextual. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 25-27, 32 (1965) ("[T]he most troublesome [ambiguity is] contextual ambiguity [either internal or external, that is,] the uncertainty of whether a particular implication arises. * * * [I]t is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication. Implication is merely the meaning that context adds to express (dictionary) meaning."); *see* United States v. Monia, 317 U.S. 424, 432 (1943) ("A statute . . . cannot be severed [from its context] without being mutilated. . . . The meaning of a statute cannot be gained by confining inquiry within its four corners.") (Frankfurter, J. in dissent); Duparquet Huot v. Moneuse Co. v. Evans, 297 U.S. 216, 220-21 (1936) ("[H]istory is a teacher that is not to be ignored.") (Cardozo, J.).

61. The Supreme Court routinely looks to the legislative history of RICO in interpreting the statute. *Reves v. Ernst & Young*, 507 U.S. at 179-83; *Holmes*, 112 S.Ct. 1317; *Reiflin*, 493 U.S. at 461; *H.J., Inc.*, 492 U.S. at 236-39; *Monsanto*, 491 U.S., at 613; *Agency Holding Corp.*, 483 U.S., 151; *Shearson/American Express, Inc.*, 482 U.S. at 238-41; *Sedima*, 473 U.S. at 486, 489; *Turkette*, 452 U.S. at 586, 589.

62. United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, 113 S.Ct. 2173, 2182 (1993) (quoting United Saving Ass'n of Texas v. Timber of Inwood Forest Associates Ltd., 484 U.S. 365, 371 (1988)). Should legislation should be principally read with reference to its operative text? As a rule of statutory construction to be applied to legislation enacted by Congress *after* a certain date, this position has much to recommend it, but as a rule of statutory construction to be applied to statutes enacted by the Congress *before* that date and *under a contrary rule of statutory construction*, this position is open to the strictures that are leveled against retroactive legislation. *See, e.g.*, Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 855-567 (1990) (Scalia, J., concurring). "Congress legislates with knowledge of . . basic rules of statutory construction." Rowland v. California Men's Colony, 113 S.Ct. 716, 720 (1993). If those rules envision an examination of legislative history—and such an examination dictates one result, for example exculpation, but not making such an examination dictates, another result, for example, inculpation—changing the rules of statutory interpretation enlarges the scope of inculpation, contrary to the principle of legality. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 58-64 (2d ed. 1960). As such, statutes ought to be construed in light of the rules of statutory interpretation followed when they were drafted. Daily Income Fund Inc. V. Fox, 464 U.S. 523, 536 (1984). In 1970, when RICO was enacted, the practice of the Supreme Court was routinely to examine the legislative history of a statute. *See, e.g.*, Nelson v. George, 399 U.S. 224, 228 (1970). Indeed a "Westlaw" search for "legislative history" in the decade before the enactment of the 1970 Act turns up 334 decisions of the Court. Resort to legislative history was, in short, routine.

Organized Crime, the Kefauver Committee investigated organized crime and noted its infiltration into legitimate business.[63] Following the Kefauver Committee's work, Senator John L. McClellan, the chairman of a number of key committees and subcommittees and subsequently one of the principal sponsors of RICO, chaired three investigations into the illegal activities of organized crime; focusing on labor racketeering, gambling, and narcotics.[64] These investigations examined illicit enterprises and the infiltration of organized crime into businesses as well as unions. Following these investigations, the President's Commission on Law Enforcement and Administration of Justice undertook an examination of organized crime; it focused on "enterprise criminality."[65] RICO's two track—criminal and civil—approach to "enterprise criminality" in the marketplace grew out of the Commission's findings and recommendations.

From 1967 to 1969, Senator McClellan and Senator Roman L. Hruska, another key Senate sponsor of RICO, also served on the National Commission on Reform of the Federal Criminal Laws. It, too, examined federal criminal law and the challenge of organized crime.[66] While the Commission considered a proposal on "organized crime leadership," it did not carry it forward in its final report. Nevertheless, the proposal, a predecessor of RICO, is enlightening since it focused on organized crime, not white-collar crime or political or social protest.[67]

c. *Illicit Enterprises:* On the basis of his hearings on organized crime, Senator McClellan introduced his syndicate bill, S. 2187, on June 24, 1965.[68] The bill was targeted at illicit enterprises; it was one of RICO's key precursors. S. 2187 outlawed knowingly "becom[ing] a member of (1) the Mafia or (2) any other organization having. . .[as] its purposes" engaging in certain designated offenses.[69] S. 2187 was Senator McClellan's first legislative effort to curtail enterprise criminality in the underworld. S. 2187 included among its designated offenses "acts. . .in violation of the criminal laws of the United States or any State, relating to gambling, extortion, blackmail, narcotics, prostitution, and labor

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63. *See* Blakey & Gettings, *supra* MAIN TEXT note 3 at 1014 n.21.

64. *See id.* at 1015 n. 22, n. 23 (reports cited).

65. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 187-210 (1967). "Enterprise criminality" consists of "organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." United States v. Cauble, 706 F.2d 1322, 1330 (9th Cir. 1983) (quoting Blakey & Gettings, *supra* MAIN TEXT note 3, at 1013-14), *cert. denied*, 465 U.S. 1005 (1984)).

66. The Commission was created by Act of Nov. 9, 1966, Pub. L. No. 89-801, 80 Stat. 1516 (1966). *See* Blakey, *supra* MAIN TEXT note 3, at 253 n.47.

67. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 1005 (1970) (defining "criminal syndicate" as "an association of ten or more persons for engaging on a continuing basis in [certain predicate crimes]"). The predicate crimes were those "which experience has shown to be the specialties of the criminal syndicates." *Consultant's Report on Conspiracy and Organized Crime*, I WORKING PAPERS: NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 381, 383-84 (1970) (Professor G. Robert Blakey).

68. S. 2187, 89th Cong., 1st Sess. (1965), 111 Cong. Rec. 14680 (1965).

69. *Id.* at § 2(a).

racketeering."[70]

Testifying before Senator McClellan's Committee, Attorney General Nicholas Katzenbach raised constitutional objections to the membership focus of S. 2187.[71] McClellan acknowledged the force of Katzenbach's testimony.[72] Senator McClellan, therefore, abandoned his membership approach in S. 2187 and adopted the "conduct" approach of RICO. As Professor Michael Goldsmith observes, "by focusing more on conduct, [Senator McClellan in] RICO sought to rectify the constitutional problems raised by S. 2187."[73]

d. *Business Enterprises:* While Senator McClellan's legislative efforts focused on enterprise criminality in the underworld, Senator Hruska introduced legislation focused on a separate, but related problem: the infiltration of legitimate business in the upperworld by organized crime. In 1967, Senator Hruska introduced S. 2048 and S. 2049.[74] These two bills were RICO's other key precursors. S. 2048 proposed amendments to the Sherman Act that would have outlawed the investing of unreported income "in any *business* enterprise" and using the "income to establish or operate. . .such. . .business enterprise." "Business" was not a word of limitation in Senator McClellan's earlier syndicate bill; it would be dropped later when the bills were integrated. Drafted to supplement S. 2048, S.2049 made it illegal for principals in certain specified crimes to invest income from those crimes in "any business enterprise." The predicate offenses were characteristic of organized crime, not white-collar crime, much less political or social protest.[75] Congressman Richard Poff introduced companion bills to S.2048 and S.2049 in the House.[76] No action was taken on these bills but they were studied by the

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70. *Id.*

71. CRIMINAL LAW AND PROCEDURES, HEARINGS ON S. 2187 ET AL. BEFORE THE SUBCOMM. ON CRIM. LAWS AND PROC. OF THE SEN. COMM. ON THE JUDICIARY, 89th Cong., 2d Sess. 31-32 (1966). The Committee on Federal Legislation of the Association of the Bar of the City of New York raised similar objections. *Id.* at 306-07 (citing the Smith Act (18 U.S.C. § 2385), prosecutions in Scales v. United States, 367 U.S. 203 (1961), *and* Yates v. United States, 354 U.S. 298 (1957)).

72. *Id.* at 37. During the House debate, Congressman Richard Poff, a key House sponsor, expressly recognized the First Amendment issues raised by criminalizing Mafia "membership," specifically citing Katzenbach's testimony on S. 2187. 116 Cong. Rec. 35344 (1970).

73. Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COL. L. REV. 774, 776-86 (1988).

74. S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); S. 2049, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); 113 Cong. Rec. 17997-18002 (1967).

75. In introducing S.2048 and S.2049, Senator Hruska stated:

> The second bill, S.2049, would prohibit the investment in legitimate business enterprises of income derived from specified criminal activity—especially those criminal activities engaged in by members of organized crime families such as gambling, bribery, narcotics, extortion and the like.

113 Cong. Rec. 17999 (1967) (emphasis supplied).

76. H.R. 11266 90th Cong., 1st Sess. (1967); H.R. 11268, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17946, 17976 (1967). In introducing his bills, Congressman Poff stated:

> [t]he first bill would outlaw the investment of income derived from specified criminal activities in

American Bar Association.[77]

In the 91st Congress, Senator Hruska introduced a new bill, S. 1623, "The Criminal Activity Profits Act", that reflected elements from S.2048 and S.2049.[78] Once again, Senator Hruska explained that the focus of his bill was on offenses characteristic of organized crime, not white-collar crime or political or social protest.[79] S.1623 included in its definition of "criminal activity" many, but not all, of the offenses that would be later incorporated in RICO.[80]

e. *Organized Crime Control Act:* On January 15, 1969, Senators McClellan and Hruska introduced S.30, "The Organized Crime Control Act."[81] As introduced, S.30 did not include RICO-type provisions. RICO was later incorporated into S.30 as Title IX.

Senators McClellan and Hruska merged their two independent, but complementary, approaches to "enterprise criminality"—in the underworld and in the upperworld—when they cosponsored S. 1861, "The Corrupt Organizations Act," which was introduced on April 18, 1969.[82] S. 1861 combined McClellan's concern with underworld organizations with Hruska's concern with infiltration of legitimate business. Senator McClellan explained that the focus of the legislation was on the various methods of "organized crime."[83] S. 1861 also dropped the word "business" from the phrase "business enterprise" in S. 1623, RICO's predecessor legislation, not to *eliminate* its commercial dimension, but to *expands* its scope

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legitimate business. The activities specified are those typical of syndicate conduct. They include gambling, bribery, extortion, counterfeiting, narcotics traffic, and white slavery.

113 Cong. Rec. 17947 (1967) (emphasis supplied).

77. *See* Blakey and Gettings, *supra* MAIN TEXT note 3, at 1016-17 (analysis of Bar Association recommendations).

78. S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6992-96 (1969). 12

79. In introducing S. 1623, Senator Hruska stated:

> In the 90th Congress I sponsored two bills, S. 2048 and S.2049 which were essentially similar to the bill I introduce today * * * The bill is a synthesis of both of those bills, incorporating all of their features into a unified whole. It attacks the economic power of organized crime and its exercise of unfair competition with honest businessmen on two fronts—criminal and civil . . . .
>
> Last year, . . . the American Bar Association examined the two earlier bills, S.2048 and S.2048, and endorsed the principles and objectives of both. * * * As a result of the ABA Recommendation [to enact the bills outside of the antitrust statutes], the single new bill has been drafted as an amendment to title 18 of the United States Code with self-contained enforcement and discovery procedures.

115 Cong. Rec. 6993 (1969) (emphasis supplied).

80. *See* S.1623, 91st Cong. 1st Sess. § 1(1)(1969); 115 Cong. Rec. 6995 (1969).

81. S.30, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 769 (1969). *See generally Measures Relating to Organized Crime: Hearings on S.30 S. 994, Before the Subcomm. on Crim. Laws and Proc. of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 4-29 (1969) (hereinafter, "SENATE HEARINGS"); *Organized Crime Control, Hearings on S.30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) ("HOUSE HEARINGS").

82. S. 1861, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 9566 (1969).

83. 115 Cong. Rec. 9567 (1969).

beyond *legitimate* businesses to *illegitimate* enterprises.[84]

The introductory language of S.1861 was similar to the introductory language of S.30, which, in turn, was derived from Senator McClellan's 1965 legislation, S.2187.[85] S.1861 was incorporated into S.30 as Title IX (RICO).[86] When S.1861 was incorporated into S.30, and reported out of the Judiciary Committee, the "predicate crimes associated with white-collar activity were [also] added to the text."[87] Accordingly, the scope of RICO as applying to white-collar crime as well as organized crime was perfected.

The scope of the remedial features of RICO was shaped in the House. S. 1623. As introduced, the bill contained not only criminal penalties but also private antitrust-type civil remedies.[88] Nevertheless, S. 1861, as introduced and as incorporated into S.30, was silent on a private claim for relief.[89] While S.30 was pending in the House, the American Bar Association endorsed it, making suggestions, including a private treble damage claim for relief "based upon the concept of Section 4 of the Clayton Act."[90] Senator McClellan termed the suggestion "constructive."[91] It was incorporated into the bill as it was passed by the House[92] was accepted by the Senate,[93] and was signed by the President.[94]

Nothing in these legislative developments reflects an intent on the part of RICO's sponsors, in the Senate or House, to permit the statute to be applicable, beyond its antitrust counterparts, to political or social protest. The final text of RICO joined themes of combatting organized crime and other syndicated activity as well as the infiltration of legitimate entities by criminal groups. Investment, takeover, and operation were prohibited; the objective was a marketplace, not only free, but characterized by integrity. To circumvent the membership problem, RICO focused not on joining a group, but on participating in its affairs through a pattern of criminal conduct. The criminal activities included in the statute were character-

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84. Goldsmith, *supra* APPENDIX H note 73, at 780. This change is confirmed by the Senate Report, which states that § 1961 "defines" enterprise' to include associations in fact, as well as legally recognized associative entities." S. Rep. 617 at 158.

85. 115 Cong. Rec. 9568 (1969).

86. Sen. Rep. at 83. The incorporation of S. 1861 into S.30 was anticipated by Senator McClellan when he introduced the bill: "Its provisions might well be incorporated by way of amendment into S.30 itself." 115 Cong. Rec. 9567 (1969).

87. Goldsmith, *supra* APPENDIX H note 73, at 787; 264 n.78; 268-79.

88. S. 1623, 91st Cong., 1st Sess. §§ 3, 4(1969). The American Bar Association endorsed the private enforcement mechanism of RICO in the Senate Hearing. *See supra* APPENDIX H note 81, at 558.

89. *See* Blakey *supra* MAIN TEXT note 3, at 262 n.71.

90. HOUSE HEARINGS, *supra* APPENDIX H note 81, at 534-44 (statement of Edward L. Wright, President of the American Bar Association).

91. 116 Cong. Rec. 25190 (1970). Other Senators also endorsed the private enforcement mechanism. 116 Cong. Rec. 36296 (1970) (statement of Sen. Dole).

92. *Id.* at 35363.

93. *Id.* at 36296-64.

94. *Id.* at 37264. The President called for civil remedies, including the treble damage provision, when he endorsed S. 30 in his Message on Organized Crime, reprinted in, SENATE HEARINGS, *supra* note APPENDIX H note 81.

istic of organized and white-collar crime, not political or social protest. The remedies, too, were principally economic (forfeiture, treble damages for injury to business or property, etc.). Accordingly, it would be beyond congressional authorization if RICO were applied to curtail political or social protest by reading "extortion" to mean "extortion" and "coercion."

f. *Predicate Acts:* The principal of selection used to include the predicate acts in RICO confirms the statute's circumscribed dimension on this issue. When a subset is selected from a set, much can be learned about the character of the subset by examining the set itself. This can be done with RICO. Its legislative history demonstrates two movements. One direction narrowed the predicate offenses to *exclude* political or social demonstration; the other enlarged the predicate offenses to *include* white-collar crimes.[95]

The predicate offenses included in Title IX were narrowed from earlier bills. As originally introduced, S.1861 defined "racketeering activity" to include "any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year . . . ."[96] Two objections were raised to this definition. The Department of Justice opposed it because of its indeterminate breadth and on the grounds of federalism.[97] The Department suggested an amendment to narrow the definition to specified offenses "customarily invoked against organized crime."[98] This suggestion was adopted by RICO's sponsors. On the other hand, the American Civil Liberties Union ("ACLU") opposed the breadth of S.30 because of a perceived threat to political or social demonstrations. It testified against the sentencing provisions of S.30 in the Senate hearings.[99] The ACLU also testified against the breadth of the original definition of "racketeering activity," which it found "particularly troublesome."[100] The ACLU

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95. *See* SENATE REPORT, *supra* APPENDIX H note 74, at 83 ("Clarifying, limiting, and expanding amendments have been made . . . ."); *see Russello*, 464 U.S. at 23 ("Where Congress includes particular language in one section. . .but omits it in another. . .it is generally presumed that Congress acted intentionally and purposely.").

96. S. 1861, 91st Cong., 1st Sess. § 3(a) (1969); 115 Cong. Rec. 9569 (1969).

97. Letter from Richard G. Kleindienst, Deputy Attorney General of August 11, 1969, *reprinted in*, SENATE REPORT at 121-26.

98. *Id.* at 122.

99. The ACLU testified:

> While it is required that conduct constituting more than one crime as part of a continuing course of activity to be engaged in or caused by one or more of the conspirators to effect the objective of the conspiratorial relationship, it is not clear, in addition to the other ambiguities encompassed in that provision, whether a conviction must have been obtained for the one or more crimes. The language is so broad that it could be regarded as including, in addition to the Mafia or other narcotics or gambling syndicates, a labor strike, a civil rights demonstration or Klan march, an anti-war or pro-war demonstration, or a campus demonstration or counter-demonstration which was expected and planned to result in some sense in a series of crimes (e.g., mass trespass or violation of a parade ordinance) even though the statute or regulation that was the basis of the "crime" is invalid either on its face or as applied.

SENATE HEARINGS, *supra* APPENDIX H note 81, at 472 (statement of Lawrence Speiser).

100. The ACLU testified:

> Last year's massive anti-war demonstration at the Pentagon resulted in a number of arrests for acts involving the danger of violence to life, limb or property indictable under state or federal law and

cited the potential impact of S.1861 on "the campus disorders which racked Columbia University a year ago April."[101]

In response, the Senate Judiciary Committee adopted two amendments to RICO. First, when the Committee incorporated S.1861 into S.30 as Title IX, it eliminated one aspect of the broad definition of "racketeering activity" ("danger of violence to life, limb or property") and replaced it, as the Department of Justice suggested, with specifically designated state offenses. Significantly, when the Senate debated the 1970 Act, the ACLU continued to oppose Title X (sentencing), but it favorably noted the responsive changes in Title IX (RICO).[102]

Second, the Senate Judiciary Committee expanded the specific federal offenses to include offenses characteristic of white-collar crime, an amendment suggested by the Securities and Exchange Commission.[103] Accordingly, between the introduction of S.1861, its incorporation into Title IX, and the reporting of the combined bills to the Senate,[104] the Judiciary Committee *expanded* "racketeering activity" beyond the subset of offenses reflected in the Penal Reform Commission's proposal to include white-collar offenses[105] and, in response to the concern of the ACLU, *narrowed* the subset of offenses to preclude its application to political or social protest. As reported, RICO was an attack on the activities of organized crime and white-collar crime but not on political or social protest.

Senator McClellan commented on the predicate offenses at a later point. Significantly, he explained the rationale of RICO, indicating that the principle of

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> punishable by imprisonment for more than one year... offenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill....

Id. at 475-76 (statement of Lawrence Speiser).

101. The ACLU testified:

> This was a group activity which resulted in arrests, involved the danger of violence to property, and involved offenses for which imprisonment for more than a year was possible. Under § .1861, Mr. [James Simon] Kunen [author of "Strawberry Statement," describing his participation in the campus disorders] could not lawfully invest any of the proceeds from his book. Whatever one may think of the offenses or the offenders in these hypotheticals, and questions of whether or not their activity is in any way protected by constitutional guarantees aside, it is clear that this proposed legislation is in no way intended to subject them to the penalties described. Nevertheless, there is absolutely nothing in the bill to prevent them from being so used.

Id. at 476.

102. "The substantive provisions of Title IX have been substantially revised so as to eliminate most of the previously objectionable features." 116 Cong. Rec. 834 (1970) (ACLU statement put into the record by Sen. Young).

103. REPORT OF THE AD HOC CIVIL RICO TASK FORCE: A.B.A. SEC. CORP. BANKING & BUS. L. at 99-100 n.130 (1985).

104. SENATE REPORT, *supra* APPENDIX H note 74, at 21-22. As amended by the Committee, the Statement of Finding and Purpose expressly mentions "fraud," and "racketeering activity" includes mail fraud, wire fraud, transportation fraud, bankruptcy fraud, and securities fraud. *See* Blakey, *supra* MAIN TEXT note 3, at 268.

105. *See supra* APPENDIX H note 87.

selection for the predicate offenses was "commercial exploitation."[106] In particular, the Bar Association of the City of New York attacked RICO, then Title IX, objecting to the Senate Report that said the predicate offenses were offenses "characteristically . . . [committed] . . . by members of organized crime."[107] The Bar Committee complained that the subset was too inclusive because it included offenses that were committed by persons not engaged in organized crime. Senator McClellan responded to the Bar Committee that he was aware that the statute was not limited to organized crime, as well as to the other objections of the ACLU, in an address after passage in the Senate, but while RICO was pending in the House.[108] Senator McClellan's point was repeated in a law review article he wrote, which was published during the consideration of the bill by the House.[109] Thus, McClellan explained the criterion by which the predicate acts were selected for inclusion in RICO: they were commercial, not political.

Congress' understanding that political and social protest was excluded from RICO may also be seen by comparing the scope of Title IX (RICO) with Title X (Dangerous Special Offender Sentencing). Title IX's application is limited by a specific list of designated crimes. Title X, however, was made applicable to all "felonies."[110] During Senate debate, Senator Edward Kennedy objected to Title X, expressing the concern that anti-war protestors, such as "Dr. [Benjamin] Spock," might be "subjected to special sentencing."[111] He proposed to amend Title X to make its application limited "to those convicted of the crimes" designated in Title IX of RICO.[112] Kennedy argued that Title X's scope ("any felony") would extend it to anti-war protesters, such as Dr. Spock, or to policemen who violate civil rights.[113] To exclude such individuals from Title X, Senator

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106. 116 Cong. Rec. 18940 (1970).

107. The Senate Report described "racketeering activity" as "includ[ing] crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations." SENATE REPORT, *supra* APPENDIX H note 74, at 158.

108. 116 CONG. REC. 18940 (1970) (emphasis supplied).

109. John L. McClellan, *The Organized Crime Control Act (S.30) or It Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW REV. 57, 161-62 (1970). Significantly, Senator McClellan's article was cited as an authoritative interpretation of RICO by Congressman Poff during the House debate. 116 CONG. REC. 35298 (1970).

110. Title X was codified at 18 U.S.C. § 3575. It was repealed by Pub. L. 98-473, Title II, chapter II, § 212(a)(2)(1984), 98 Stat. 1987 (1984).

111. 116 CONG. REC. 845 (1970). Dr. Benjamin Spock was convicted of conspiring to violate the Selective Service Act by staging sit-ins at armed services recruitment centers, draft card burnings, and demonstrations, but his conviction was reversed on appeal and remanded for a new trial. United States v. Spock, 416 F.2d 165, 168 & n.2 (1st Cir. 1969). Dr. Spock's anti-war conduct closely parallels the allegations against Respondents: sit-ins, demonstrations, and press conferences, mass surrenders of draft cards, and card burnings.

112. 116 Cong. Rec. 845 (1970).

113. The ACLU expressed the same concern about Title X:

> "In addition to organized crime cases, this provision might be read as applying to civil rights activists or political demonstrators (where a pattern of 'criminal' conduct might be a series of technical trespasses). The Dr. Spock case and the pending case of the Chicago 7 come to mind."

116 CONG. REC. 855 (1970) (ACLU statement introduced by Senator Young).

Kennedy proposed an amendment to limit Title X to the specified offenses in Title IX, by substituting for "any felony" in Title X the list of offenses in Title IX.[114] In response, Senator McClellan argued for making Title X applicable to "any felony," and he objected to limiting Title X to offenses specified in Title IX[115] "It seems to me," Senator McClellan argued, "that it would be a grave mistake to restrict dangerous offender sentencing to any list of specified offenses supposedly typical of organized crime."[116] Senator Kennedy's amendment failed to pass.[117]

Obviously, this exchange demonstrates an informed judgment of Senators McClellan and Kennedy that Title IX would not include Dr. Spock, that is, Title IX did not apply to political or social protest. Senators Kennedy and McClellan thought that if Title X were limited to the specific list of offenses in Title IX, Dr. Spock would be excluded from Title X. Accordingly, the intent of the key sponsor of RICO, Senator McClellan, not to have it applicable to political or social protest is manifest.[118]

The principle of selection used to exclude certain offenses from RICO provides further confirmation that RICO was consciously designed not to impact first amendment freedom. Had Senators McClellan or Hruska wanted to make RICO applicable to political or social protests, they had only to add "coercion" to the list of state offenses. Since it is not in the predicate offenses, it ought now to be added in effect by the interpretation of "extortion" to include "coercion."

Title 18 U.S.C. § 2101 is conspicuous by its absence from the list of predicate federal offenses.[119] The omission of the anti-riot provisions of § 2101 in RICO is also crucial in light of the roles played in the enactment of § 2101 by Senators McClellan and Hruska, the two principal sponsors of RICO in the Senate. Both were aware of the statute. Had either wanted RICO to cover illegal demonstrations, little effort was required to add § 2101 to the list of predicate federal offenses.

Between November, 1967 and August, 1969, Senator McClellan, as chairman of the Senate Permanent Subcommittee on Investigation, held 71 days of hearings on

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114. *Id.* at 845-46.

115. *Id.* at 846.

116. *Id.* at 845.

117. *Id.* at 849.

118. The isolated comment in the House debates that RICO might apply to some undefined "counter-revolutionary activity" is entitled to little weight. 116 CONG. REC. 35326 (1970) (statement of Cong. Rarick) It is not the informed commentary of a sponsor. S & E Contractors v. United States, 406 U.S. 1, 13 n.9 (1972).

119. 18 U.S.C. § 2101(a)(1) (1994) in pertinent part, provides:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce. . . .with intent—(A) to incite a riot. . .Shall be fined not more than $10,000. . . .

18 U.S.C. § 2102(a) (1994), in pertinent part, provides:

> As used in this chapter, the term "riot" means a public disturbance involving. . .an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual. . . .

riots and other civil disorders.[120] After H.R. 421 passed the House, the Senate Judiciary Committee held 13 days of hearings on it. H.R. 421 was the legislation that first proposed adding § 2101 to Title 18.[121] Senators McClellan and Hruska each chaired a day of those hearings.[122] Senator Hruska spoke on the floor[123] in favor of the amendment to the Civil Right Act of 1968[124] that added § 2101 to Title 18.[125] Senators McClellan and Hruska also voted for the amendment.[126] Accordingly, Senators McClellan and Hruska were aware of the issue (civil disturbances) and the law (18 U.S.C. § 2101) when RICO was drafted and enacted. Repeatedly, Senator McClellan referred to his own investigations into organized crime, labor racketeering, narcotics, and gambling when he reported S.30 to the Senate[127] and spoke in favor of the bill on the Senate floor.[128] McClellan and Hruska, however, do not mention civil disturbances in speaking in favor of S.30 or Title IX. McClellan does not refer to his work in investigating civil disturbances and neither McClellan nor Hruska refer to his efforts in processing 18 U.S.C. § 2101. Had either wanted to include political or social protest, rather than to exclude it, no doubt they knew how to speak their minds.[129] Twisting RICO to make it applicable to political and social protests by expanding "extortion" to include "coercion" is inappropriate.

9. *Conclusion*: "Obtaining" in 18 U.S.C. § 1951(a) means "taking". It requires not only that the victim lose property, tangible or intangible, but that the perpetrator or a third person "get" it. "Obtaining" does not, in short, mean "to deprive" or "to part with."[130]

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120. *Riots, Civil and Criminal Disorder, Hearings before the Sen. Permanent Subcomm. on Investigations of the Comm. on Government Operations*, 90th and 91st Cong., 1st and 2nd Sess., Parts 1-234 (1967-1969).

121. H.R. 421, 90th Cong., 1st Sess. (1967); *Anti-Riot Bill 1967: Hearings before the Comm. on the Jud.*, 90th Cong., 1st Sess. Parts 1 & 2 (1967).

122. *Id.* Part 1 at 353 (August 7, 1967) (McClellan); *Id.* Part 2 at 753 (August 28, 1967) (Hruska).

123. 114 CONG. REC. 5211 (1968) (statement of Sen. Hruska)

124. Pub. L. 90-284, 82 STAT. 73 (1968).

125. 114 CONG. REC. 5033 (1968).

126. *Id.* at 5214 (1968) (the amendment passed 82 to 13).

127. SENATE REPORT, *supra* APPENDIX H note 74, at 76-78.

128. 116 CONG. REC. 585 (1970).

129. *See also* Title XI of S. 30, 84 STAT. 952-60 (1970), which enacted Chapter 40, Importation Manufacture, Distribution and Storage of Explosive Materials (18 U.S.C. § 841 *et. seq.*). The crimes enacted in Title XI were not included in the list in Title IX (RICO). Title XI was "prompted" for inclusion in the legislation "by the national emergency of criminal bombings brought into dramatic focus by the recent tragedy at the University of Wisconsin." 116 Cong. Rec. 35201 (1970) (statement of Cong. Poff). Not including the new offenses, Title IX was consistent with the desire not to have RICO applicable to political or social protest. *Russello*, 464 U.S. at 23.

130. The analysis of this Appendix is in general accord with the Gnaig M. Bradley, *NOW v. Scheidler: RICO meets the First Amendment*, SUPREME COURT REVIEW 1994 129 (1995).

Mr. MCCOLLUM. Professor Volokh, you are recognized.

STATEMENT OF EUGENE VOLOKH, ESQ., PROFESSOR OF LAW, UCLA LAW SCHOOL

Mr. VOLOKH. Thank you. I have three basic, relatively narrow points that I wanted to make.

The first is that these discussions often draw a dichotomy between first amendment protected speech and violence. It seems to me that this may be a false dichotomy. Really what we are talking about in a lot of these cases are three possibilities:

One is first-amendment-protected speech.

The second is behavior such as blockades, trespassing and sit-ins that are not protected, that are criminal, and that have traditionally been punished—but punished fairly lightly, with an arrest, a day or two in jail, or some fines. There is a sense, a sense which I personally do not share but many others do, that this kind of unlawful but nonviolent civil disobedience can be an important way to engineer social change, that it has in the past led to a considerable amount of good, and that even though it is criminal and it does violate people's rights it sometimes has significant social utility and should not be stomped on as hard as the third category, which is violence—throwing bombs, vandalism, personal injury, and overt threats of personal injury.

There are the three categories. Personally, I would treat the second category the same way as the third. I have never supported the notion of civil disobedience, except perhaps to laws that are really egregious, in which case the legal system is not going to help out anyway.

I think sit-ins and blockades, whether to oppose abortion or oppose the draft or support civil rights, are wrong because they violate people's property rights and interfere with people's ability to lead their lives as they please. Therefore, it seems to me, if one shares this view, one can easily say it is no big deal that RICO might punish such civil disobedience.

But, I know a lot of other people would say yes, indeed, sit-ins, blockades and such should be punished, but they should not be punished with the full force of Federal civil and criminal law enforcement. They should not be punished with the full force of RICO, which is a statute which provides penalties considerably greater than what has been traditionally done for conduct in this the second category of nonviolent civil disobedience.

In fact, as alluded to by Mr. Blakey and Mr. Marine, most people think of extortion as involving the threat of violence. But courts have defined it more broadly. For example, in the *Libertad* v. *Welch* case and in the Scheidler trial itself, the court interpreted the very act of blockading as a form of extortion, the theory being that it is a use of force—an interference with the use of property, perhaps by the threat of future such interference.

Now, I think that is somewhat unusual definition of extortion. I think that somebody can support it, but if one supports the definition, they have to realize that, indeed, all sorts of protest movements which do involve forceful occupation of another's premises would be punished by RICO.

So if one believes that civil disobedience through nonviolent actions such as sit-ins and blockades should not be included in RICO, it seems to me that the answer is not to jettison extortion altogether but to make clear that it applies to only wrongful or threatened violence and not just "force," which may be interpreted to cover, as I said, trespass and blockade.

That is my first point. If you value civil disobedience, then you might want to consider excluding nonviolent, although illegal and constitutionally unprotected, conduct from the scope of RICO.

My second point goes to one particular first amendment problem. RICO generally does not cover constitutionally protected speech and cannot lawfully do so, but there is at least one area in some of the cases where RICO suits might have overstepped constitutional bound ones, and that is the area of threats.

We all agree that certain kinds of specific threats are constitutionally unprotected. At the same time, the courts have recognized that often in protest movements there is going to be forceful and threatening language used. In *NAACP* v. *Claiborne Hardware*, where there was an NAACP boycott of racist businesses, the civil rights leader, Charles Evers, was talking about possibly that necks would be broken and the sheriff could not sleep with boycott violators at night. The Court said that even though this is forceful language, it is a form of constitutionally protected political hyperbole.

Unfortunately, I have seen in some cases, for example, the Planned Parenthood of Columbia case at pages 1372 through 73, that certain similar statements, for example, a poster condemning doctors who provide abortions, have been interpreted this way, and I think courts are too liberal in letting such matters go to the jury.

Under *NAACP* v. *Claiborne Hardware* and under the general doctrine of independent judicial review, courts ought to determine before the case goes to the jury whether or not this material is a true threat or just very forceful and perhaps intimidating but nevertheless constitutionally protected rhetoric.

So one possible clarification you may consider to the statute—which courts would have to arrive to in any event under sound application of constitutional doctrine—is that courts should, at the summary judgement stage (before the case goes to the jury) exclude material which might be intimidating but is nevertheless constitutionally protected under Claiborne Hardware.

And, finally, the third point: I think that RICO is a good statute which can be properly applied to terrorist organizations, even ideological ones. At the same time, for any law there is always the risk that the very existence of the law will chill people who are not actually covered by the law.

Say there is a lawsuit brought against an organization that is nonviolent and engaged in perfectly lawful first-amendment-protected activity. They are innocent, but nonetheless a lawsuit is brought. They have to defend against it. They have to spend a lot of money and time defending against it, and they may in the future be chilled from lawfully protected conduct by the bringing of this lawsuit.

I personally do not think this is much of a problem with the statute, but I know that other people may differ. And if indeed one thinks that this statute, even though in theory inapplicable to such

law-abiding organizations, is in practice likely to lead to a lot of litigation and alot of costs to such legitimate organization then it may be reasonable for Congress to specifically exclude political advocacy groups, leaving it to courts to more precisely elaborate the meaning of this term.

To briefly summarize the three points, Congress may consider limiting "extortion" to violence; second, it may make clear that courts should be careful about punishing purported threats; and, third, it may consider the possibility of limiting this statute to non-ideological organizations.

Mr. MCCOLLUM. Thank you.

Mr. Brejcha.

STATEMENT OF THOMAS BREJCHA, ESQ., PRO-LIFE LAW CENTER, CHICAGO, IL

Mr. BREJCHA. Mr. Chairman and members of the committee, we appreciate your kind invitation to appear today.

Let me say that we submitted a rather long prepared statement, and after 11 years of litigation in Chicago, and it originally began in Delaware, we could have submitted far more, and I will leave a lot of the detail of our litigation to that prepared statement and to answering questions that any members may have.

But let me say that we come here today resisting the temptation to reargue our case to Congress. Judge Coar is an able jurist, and *NOW* v. *Scheidler* remains a work in progress. The case is not over. No judgment has been entered as yet on that verdict. We just concluded last week a 3-day hearing on plaintiffs' request for entry of a nationwide injunction against the named defendants and anybody in the country who might be in active concert or in participation with them.

We are pleased to say that former U.S. Attorney General Ramsey Clark has joined our defense team and was present at least for the concluding day of that hearing, and that indeed far more is at stake in this litigation and here today than the fate of any particular defendants or even of our pro-life movement. What is at stake here is really the ability of citizen protest groups of any stripe, of any persuasion, to organize and mount some sort of sustained campaign that may involve acts of civil disobedience.

The Professor has made many points, and the point that the false dichotomy between what is lawful and non-lawful is unhelpful here in many ways, is an extremely important point because civil disobedience, by definition, violates laws. The people who engage in civil disobedience are prepared as part of their conscientious self-sacrificial act to pay what price might be meted out by reason of their having taken that action.

There is no question that laws that are broken require or call for some sort of penalty if, in fact, there is an adjudication of a law violation. The question here is whether that penalty, whenever that law may be broken, would be a penalty for extortion and a law that traditionally is aimed at elements of organized crime or those that are out to get something by making threats of serious harm or violence against somebody else.

Nobody in these protest movements is out to get anything but what they may feel profoundly to be something critical for our soci-

ety in terms of social reform. And indeed we presented at the injunction hearing a whole array of witnesses, many of whom were not allowed to testify because of limitations of time, representing protest groups outside the pro-life movement.

Jim Douglas with his wife Shelley founded Ground Zero Campaign for Nonviolent Action Against Nuclear Weapons. He testified that the chilling effect of the idea that RICO might be applied against their crusade, that he might have lost his home, his freedom, by virtue of what he felt to be something that drove him as a matter of his belief in what this country stood for to take action and get involved, that that was indeed chilling and was tantamount to a subzero blast.

It is precisely this inevitable tendency of protest groups involving such fundamental issues that drives their participants and leaders to engage from time to time in acts of self-sacrificial civil disobedience. It is precisely that that makes the matter before us today so critical. Because criminalizing those acts as trespass and disorderly conduct is one thing, but criminalizing such acts as extortion or racketeering is something else. This is indeed a bipartisan position that we urge today.

Patricia Ireland is not listed as a witness, but a photograph of her appears in our papers handcuffed when she personally engaged in an act of a civil disobedience on her part. The history of the suffragettes is replete with courageous women like Susan B. Anthony, who dared to violate law in what they felt was a compelling cause, a need to dramatize what they stood for by standing up and taking what penalty was meted out for them.

But it wasn't RICO. It shouldn't be RICO. It wasn't extortion. They were not threatened with loss of their livelihood, with loss of house and home. They were not tied up in litigation for 11 or 12 years, litigation of the sort that, even if you win it, you will be destitute at the end of it. And of course, as I said, we are not near the end in *NOW* v. *Scheidler*.

I do ask almost by way of personal privilege in light of Representative Schumer's remarks to say something about the particulars of our case. Yes, there was evidence of violence, but another critical part of this is that the violence that is charged is not necessarily on the part of the RICO defendant. As my opposing counsel's papers submitted this morning emphasize, what RICO does is criminalize leadership of organized protest groups, even if those leaders speak for nonviolent methods of protest, even if they take precautions to be sure that those who are fellow travelers or adherents of their groups are nonviolent. In fact, even if they preach the message of nonviolence with enthusiasm and urgency, they may be held accountable and, in this case, were held accountable under RICO for the acts of persons who may have been fellow travelers who may have come to one meeting, who may have been on a picket line, but who acted for themselves. And the idea that a bombing victim may testify this morning against us epitomizes this problem.

We deplore what happened in Birmingham in that act of violence. Our clients have repeatedly spoken out against violence, deplored it, discouraged it and did everything but use the word "condemn," which they don't use on moral grounds, but that they

should be held answerable for what they deplore is itself deplorable and a real betrayal of what this country stands for.

Just concluding very briefly and bluntly, that use of extortion and racketeering statutes against any protest movement in effect takes Dr. King's famous letter from the Birmingham jail, which is our best, most eloquent statement of the role and significance of civil disobedience in this country, and turns that precious historic document into a manual for extortion.

It was nothing of the sort. Even to suggest that seems sacrilegious. It offends and destroys much of what this country has stood for and should continue to stand for.

Why has the Justice Department not pursued people under RICO? Because this Congress, just a few years ago passed the FACE Act, one of the most draconian statutes. In attacking pro-life, antiabortion terrorism, violence, even mere interference with access to abortion clinics, the litigation under the Freedom of Access to Clinic Entrances Act has burgeoned. The Justice Department has brought numerous repeated lawsuits around this country, including against main line pro-life groups, for interfering with access, and for civil disobedience in front of clinics. Nobody does it, really, any more. Why? Because the prices have bid that tactic out of the affordability of anybody but those who don't have jobs or don't care. Nobody can afford to lose their livelihood, to lose their homes by virtue of that civil disobedience. The FACE Act does outlaw everything that Mr. Schumer spoke against. It covers all of those evils.

To use RICO against protesters simply takes the problems that arose in our case and spreads them across the entire spectrum of civil protest, covering every variety of protest on the left, the right, the whole spectrum of issues on which American citizens may feel so deeply that they may get involved and occasionally get involved in acts of civil disobedience.

Thank you.

Mr. MCCOLLUM. Thank you, Mr. Brejcha.

[The prepared statement of Mr. Brejcha follows:]

PREPARED STATEMENT OF THOMAS BREJCHA, ESQ., PRO-LIFE LAW CENTER, CHICAGO, IL

I. THE "RICO-SPECTRE" THREATENS TO POISON AMERICAN POLITICS AT THE GRASSROOTS

The undersigned, defense counsel for four of the five defendants in *NOW* v. *Scheidler*,[1] is pleased to submit this Statement in support of proposed legislation to curtail the abusive prosecution of civil claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 et seq. against non-violent groups engaged in political advocacy. Indeed, the *NOW* v. *Scheidler* litigation epitomizes the grave peril that such civil RICO suits pose for citizens who would heed our lofty exhortations that they "do more" than cast their ballots on election days, that they "get involved" in American politics at the grassroots level, that they band together back in their state and local communities and organize into groups, alliances, networks. This populist thrust of our politics is now overshadowed by the grim spectre of potential civil RICO liability. As in *NOW* v. *Scheidler*, that RICO-

[1] Together with co-counsel, Ramsey Clark, Esq., former U.S. Attorney General, of New York City, Richard Caro, Esq., former Assistant U.S. Attorney for the E.D.N.Y., of Illinois, and Deborah Fischer, Esq., of St. Louis, the undersigned represents defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc.

The sole remaining co-defendant in the case, an association-in-fact called "Operation Rescue," is represented by three attorneys affiliated with the American Center for Law & Justice, namely, Larry Crain, Esq., of Nashville, David Cortman, Esq., of Atlanta, and Skip Ash, Esq., of Virginia.

spectre entails an exposure to draconian treble damage awards, massive assessment of attorneys' fees, and nationwide injunctions—whenever some like-minded activist, who may be "linked" to a potential defendant by some chain of association, however remote, direct or indirect, who may have attended some national, regional, or local convention or forum, or joined in a demonstration with a defendant, engages in two or more acts of peaceable non-violent direct action within a period of ten years, including conscientious acts of civil disobedience, causing injury to "business or property." That injury may be no more than mere economic loss, occasioned during the two or three hours' duration of a demonstration. And all that need be shown by way of "predicate acts of racketeering" is that, for example, access to a place of business was blocked by one or more persons peaceably engaged in a "sit-in."

Keep in mind, of course, that one may not escape the RICO-spectre simply by refraining from direct participation in acts of civil disobedience. So long as those acts are undertaken by others who may profess to share an allegiance to the same group or cause, whose ties may be more or less tenuous, anybody who may be found to "operate" or "manage" the group or cause may be sued, and indeed may be held liable. This amounts to "guilt by association" in an extreme and virulent form, which represents the very antithesis of the spirit of our democratic politics and a corruption of the ancient moral principle of individual responsibility and guilt. Jury Instruction No. 20 in *NOW* v. *Scheidler*, purporting to define RICO's Third Element, that a defendant be "associated with" with an alleged racketeering enterprise, spells out just how far and wide the RICO dragnet may be cast:

> ". . . the defendant must have had some minimal association with [the racketeering enterprise] and have known something about [its] activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all the unlawful acts committed by the other people who were associated with [the racketeering enterprise].
>
> "If the defendant was associated with [the racketeering enterprise] at any time during its existence, this element is met. It is not necessary that the particular defendant be associated with [the racketeering enterprise] for the entire time that it existed."[2]

Really, whether or not somebody who decides to engage in grassroots citizen politics may or may not be found guilty of violating RICO after a jury or bench trial almost begs the question. For it doesn't matter so much if you're guilty or innocent, if you will risk being put out of house and home just by being sued. Imagine the grim prospect of suffering through years of federal racketeering litigation, only to win a "not guilty" verdict several years down the road! Financial destitution or bankruptcy, sweetened with the balm of belated legal vindication. Few citizen activists have enough savvy or commitment, let alone the wherewithal, to retain counsel to defend their interests for even a single deposition, pursuant to the form of subpoena *duces tecum* that has become *de rigeur* in this sort of litigation, calling for production of all documents relating to the activities, organization, membership, and fund-raising of their entire local group and/or affiliates. The broader the RICO charges are drawn initially, the broader the scope of permissible discovery—in *NOW* v. *Scheidler* we were tasked to defend repeated rounds of depositions that were taken not only in Chicago but all over the country, in Portland, Oregon, Washington, D.C., Raleigh, North Carolina, Fort Wayne, Indiana, Fargo, North Dakota, Maryland, Pensacola, Florida, Dallas, Texas, Southern California, and finally, in Topeka Womens' Prison and on Florida's death row. Our requests for leave to have depositions taken by telephone were all turned down, by both plaintiffs and by the district court, with the sole exception of the December, 1988, deposition of the Respect Life Director of the Roman Catholic Diocese of Fargo, North Dakota.

Thus the out-of-pocket expenses of defending *NOW* v. *Scheidler*—paying for deposition and trial transcripts, airline tickets, duplicating exhibits, etc.—have run heavily into six-figure boxcar numbers, and the lawsuit, now into its thirteenth year, is far from over. Certainly, if we couldn't afford to cover all the depositions where our clients' vital interests, including their constitutional as well as financial interests, were at stake in such a high-profile case, how can local political activists be expected to fund aggressive or adequate defenses against racketeering charges in which they might be named or otherwise implicated? Many of these suits, which are

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[2] Of course, as far and wide as the RICO dragnet may be cast when suits are brought under 18 U.S.C. § 1962(c), under which the jury returned its verdict late last April against the defendants in *NOW* v. *Scheidler*, the RICO-spectre extends yet further under 18 U.S.C. § 1962(d), which outlaws conspiring to (*i.e.*, agreeing that somebody else) operate or manage any racketeering enterprise.

sprouting up like mushrooms around the country, may go to default—a danger sign for the vitality of our democratic institutions.

II. THE INDISPENSABLE CORE OF PLAINTIFFS' TRIAL THEORY IN NOW V. SCHEIDLER WAS THAT WHOLLY PASSIVE, TEMPORARY BLOCKING OF PHYSICAL ACCESS MAY BE ASSAILED AS "FORCEFUL" OR "VIOLENT" AND EQUATED TO "EXTORTION"

NOW v. *Scheidler* was originally filed back in June, 1986, in the federal district court at Wilmington, Delaware, as a single-count claim under the federal antitrust laws. NOW and two abortion clinics, represented by Morris Dees, Richard Cohen, and Elizabeth Johnson of the Southern Poverty Law Center, charged that the defendants (then including Scheidler, his Chicago-based Pro-Life Action League, Inc., John Ryan[3] and his St. Louis-based Pro-Life Direct Action League, Inc., and Joan Andrews) were engaged in an unlawful nationwide "conspiracy in restraint of trade," specifically, to "shut down" the commerce of abortion. Defendants' motions to dismiss were denied, on the grounds *inter alia* that the sheer adverse impact of their protest on the clinics' businesses rendered them "commercial" actors, amenable to regulation under the rubric and metric of antitrust (though later NOW conceded that the only "market" in which the parties competed was the "marketplace of ideas").

But then after canvassing all of Scheidler's and the League's correspondence and other files, finding nothing to support their propaganda that defendants were tied to any violent conspiracy,[4] Messrs. Dees, Cohen, and Ms. Johnson of the Southern Poverty Law Center withdrew from the case. Patricia Ireland, then NOW's executive vice-president, stepped in as lead counsel, and plaintiffs promptly amended their complaint, adding new claims and new defendants in February, 1989, including three new federal racketeering charges under RICO. Plaintiffs now claimed that the League, Scheidler, and new defendants including Monica Migliorino of Milwaukee, Randall Terry of Binghamton, New York, and Operation Rescue were not just antitrust conspirators, but also "extortionists," who conspired to put the abortion industry in "fear" of losing its business. Plaintiffs also sought to bolster their antitrust claim, by adding yet another defendant, Conrad Wojnar, proprietor of Chicago-area non-profit, volunteer-staffed pregnancy-support counseling centers and a home for unwed mothers. This, NOW and the clinics urged, constituted direct "competition" with the clinics' own "commerce"—as if the "value" of a child's life, surpassing all measure of value and transcending the digits on any balance sheet, could be weighed on some jeweler's scale as against the cost of its own abortion.

But then as now, the heart of plaintiffs' claim was that the "direct action" tactics used by the defendants and their hundreds, thousands, or tens or hundreds of thousands[5] of alleged co-conspirators—including the sit-in's or "rescues" staged by Randall Terry's "Operation Rescue" from 1987 and thereafter—constituted "extortion" violative of the federal Hobbs Act, 18 U.S.C. §1951. Indeed, in their initial and amended RICO claims, plaintiffs cited Hobbs Act extortion as the only predicate "act of racketeering" forming the alleged requisite "pattern" for making out the RICO violation. Thus although plaintiffs' supporting papers (called a "RICO Case Statement") purported to detail an extensive variety of violent acts allegedly committed by the defendants' "co-conspirators" around the country, "includ[ing] at least 23 acts of arson and attempted arson; 33 fire bombings; 11 acts of destruction of clinic property; 8 assaults and batteries upon clinic staff and personnel," etc., all these acts were only alleged to constitute to same crime of federal extortion.

After the district court denied four successive motions to dismiss plaintiffs' claims as pled, suddenly in late May, 1991, five years after the initial filing of suit, Judge James Holderman granted the fifth such motion we'd filed back in August, 1990. NOW and the clinics appealed to the U.S. Court of Appeals for the 7th Circuit, which unanimously affirmed the dismissal of both the antitrust and RICO claims,

[3] Ryan dropped out of active participation in the pro-life movement within a couple of years after NOW sued him. NOW nonetheless persisted in suing him until he and the St. Louis League settled with plaintiffs after the Supreme Court's decision in 1994.

[4] NOW accompanied the filing of the case with a plethora of publicity about the rash of arsons and bombings at clinics in the early to mid-80's, urging that it decided to file suit in order to "stop the violence," yet it never formally pled its contention that defendants were guilty of such violent misconduct, or of conspiring with others to engage in violence, within the lawsuit until it sought, and obtained, review in the Supreme Court. On prevailing there, plaintiffs promptly amended anew to plead an explicit claim that defendants' racketeering activity and/or conspiracy encompassed a pattern of predicate acts including murder, arson, and kidnaping as well as extortion (*i.e.*, clinic blockades), fetal thefts, travel across state lines to commit felonies, etc.

[5] Maureen Burke, a NOW vice-president, testified at her deposition and repeated at trial that NOW gauged the size of the nationwide conspiracy charged in its pleadings as only "possibly . . . less than a million" persons!

and on plaintiffs' petition for rehearing *en banc*, not a single Judge voted for rehearing.

While the U.S. Supreme Court denied plaintiffs' petition for review of the antitrust dismissal, review was granted on the two RICO counts that NOW and the clinics appealed (§§ 1962(c),(d)),[6] on the narrow issue whether RICO's text supported the district court's cited ground of dismissal, namely, that the conduct of an "enterprise" through "racketeering" required a plea and proof as to some economic motive. The high Court found no such economic limitation in RICO's text, which broadly defined "enterprise" to encompass any "association in fact," and it held that no such "implied exception" could be read into RICO's plain terms. Justice Rehnquist, writing for the Court, explicitly stated in a footnote that the Court did not understand that any First Amendment issue had been raised below; that none was passed upon by the Supreme Court; and that those issues remained fully open to adjudication on remand of the case to the trial court. Justice Souter, concurring (joined by Kennedy, J.), emphasized that the district court on remand should "notice that RICO actions could deter protected activity and . . . bear in mind the First Amendment interests that could be at stake." He also "stress[ed] that nothing in the Court's opinion precludes a RICO defendant from raising a First Amendment in its defense in a particular case," adding that: "Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis" (114 S.Ct. 798, 807 (1994) (Souter, J., concurring).

On remand, the Seventh Circuit Court of Appeals, in an unpublished opinion, directed that the district court address the questions highlighted in Justice Souter's concurring opinion, namely, whether the predicate acts alleged in the complaint in fact violated the Hobbs Act, and which of the defendants' activities, as alleged, are protected by the First Amendment, given that "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression" (citing and quoting *NOW* v. *Scheidler*, 114 S.Ct. at 806 n.6, 807). The Seventh Circuit further took note that "Hobbs Act extortion [was] the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement." *NOW* v. *Scheidler*, 25 F.3d 1053, 1994 WL 196761 **2 (7th Cir. 1994).

But on remand, before the district court complied with this mandate, however, plaintiffs sought and secured leave to file their third amended complaint. Suddenly the number of "predicate acts of racketeering" alleged by plaintiffs had proliferated from the single claim of Hobbs Act extortion into an entire cluster of claims. Plaintiffs now alleged that, through their alleged racketeering enterprise, the Pro-Life Action Network ("PLAN"), defendants conducted a pattern of violations of the Hobbs Act, 18 U.S.C. § 1951, the Travel Act, 18 U.S.C. § 1952, and the Theft from Interstate Shipments Act, 18 U.S.C. § 659 (by allegedly stealing and transporting fetal remains said to be worth over $100), as well as violations of state criminal statutes outlawing murder of clinic personnel, including doctors and their families, kidnaping of clinic personnel, arson against clinics, and acts or threats to commit extortion and/or the commission or threat of physical violence to persons and property.

In adjudicating the summary judgment motion brought by defendants Randall Terry[7] and Operation Rescue last September, 1997, while finding "a plethora of evidence" to demonstrate "genuine issues as to defendants' affecting of intangible property—the right to pursue a lawful business—by the forced closing of clinics through the use of fear," entitling plaintiffs to go to trial on their claims of Hobbs Act violations, the court found no support for plaintiffs' new claims on remand from the Supreme Court that defendants had engaged in predicate crimes of violence.

A. No Evidence Supporting the Predicate Act of Murder—Thus noting that "the record fails to support plaintiffs' allegation that any of the defendants individually or through PLAN committed the predicate act of murder," the district court further noted that plaintiffs were "noticeably strained in their attempt to implicate the defendants in the attempted murder of Dr. George Tiller, and the murders of Dr. John Britton and James Barret" (Op. 38–39). Reviewing plaintiffs' evidence of alleged links between defendants and Rachelle Shannon, on the one hand, and Paul Hill, on the other hand, the court concluded: "Not only does this evidence fail to support

[6] A third RICO count, pled under 18 U.S.C. § 1962(a), was jettisoned when plaintiffs petitioned for writ of *certiorari*.

[7] Defendant Terry settled the case just prior to the filing of the pretrial order before the March jury trial got underway, agreeing to entry of a nationwide consent injunction rather than risking liability for treble damages and attorneys' fees, etc.

plaintiffs' theory, but it lends credence to the contrary proposition that there was no conspiracy between either Shannon or Hill and the defendants" (Op. 39).[8]

B. No Evidence of Kidnaping or Arson—Here, the district court again found that "plaintiffs try again to implicate defendants through the acts of third parties who have no established connection to defendants or PLAN that would cause this court to impute the acts of those third parties to the defendants or PLAN," for example, citing Ms. Shannon's deposition testimony about her various acts of arson and attempted robbery "without demonstrating that defendants were in any way involved in these acts" (Op., 40).

C. Plaintiffs Give Up Claiming Theft from Interstate Shipments of Fetal Remains—The district court granted summary judgment for Operation Rescue and Terry on this ghastly claim, and plaintiffs elected themselves to jettison the claim shortly before trial. By this means, plaintiffs escaped their burden of proving that these human remains, which had been destined for disposal as mere "waste" when diverted by defendants and others for humane religious burial, qualified as "goods" belonging to the clinics (which had shipped them for disposal to the pathology lab from whose open loading dock they were retrieved)[9] which were "worth" not less than $100 in market value. Defendants, of course, contended their value to be priceless.

D. Jury Trial Proof of "Violence" & Extortion—Thus at trial, the focus of plaintiffs' proofs was once again on their core claim that defendants or others "associated with the enterprise" or "co-conspirators" had been guilty of repeated acts of extortion, amounting to an obstruction of interstate commerce "by blockading abortion clinic doors, obstructing doctors' and patients' ingress to and egress from abortion clinics, and threatening, harassing, and assaulting abortion clinic personnel and clients," and placing the latter "in reasonable fear" by reason of these incidents.

Plaintiffs sought to bolster and embellish this claim before the jury by arguing that defendants had a "strange" or skewed definition of "violence." More specifically, plaintiffs argued, defendants overlooked the fact that putting one's physical self between a woman seeking "medical services" and the clinic she is trying to enter cannot be categorized as "non-violent." Instead, this physical interposition or "blockading" constitutes an aggressive, violent act. Similarly, going limp upon being arrested is not "non-violent," but rather an aggressive act of "resisting arrest." Throughout the jury trial, while repeatedly bringing up the acts of violence that Judge Coar had ruled out of the trial—namely, the shootings of the abortion doctors and escorts, with which defendants were *not* implicated—plaintiffs pressed their contention that defendants, their "co-conspirators" and others "associated with the PLAN enterprise" around the country, were guilty of an onslaught of violent acts and threats of violence against abortion clinics by virtue of the mass demonstrations, staged by Operation Rescue and other groups, that involved acts of civil disobedience in the form of passive blocking of access to the clinics for some period of time. These acts were then cited as grounds for finding defendants guilty of extortion under federal and state laws, through deprivation of womens' rights of access and clinics' rights to do business, etc. by virtue of "fear," "force," and "violence."

III. PLAINTIFFS' EXTORTION THEORY REBUFFED GENERATIONS OF JURISPRUDENCE UNDER THE HOBBS ACT

A. Plaintiffs' Theory Distorts the Hobbs Act—Plaintiffs prevailed on the district court to adopt an improperly, indeed unconstitutionally, overbroad reading of the Hobbs Act. Thus the ideological dynamics of political cases like this one breed erratic distortions in the adjudication of controlling issues of substantive law.

Here, the district court upheld plaintiffs' skewed extortion theory that they "parted with" property rights out of "fear" stemming from threats of economic loss or "forceful" or "violent" acts on the part of the defendants or others "associated with

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[8] Among other things, the district court pointed out that plaintiffs' own evidence demonstrated that "PLAN leaders and core members, including defendant Scheidler and other named defendants, refused to sign a petition supporting a theory of 'justifiable homicide' with respect to pro-life activism and attempted to dissuade Hill from subscribing to that theory" (citing *inter alia* both Scheidler's and Hill's depositions as well as plaintiff's exhibits).

[9] The loading dock was a nightmarish scene crying out for intervention, stacked with stained, stinking, putrid cardboard cartons and drums awaiting pick-up for refuse disposal, prompting an unknown lab employee to phone a well-known pro-life counselor, who in turn phoned the League. Retrieval of these remains was witnessed by lab representatives who did not interfere and, in fact, told the press that they were "through with them" once put out in the back.

The entire episode constituted a modern mirroring, if not a reenactment, of Sophocles' *Antigone*, the most striking variable being that Creon's command, according to plaintiffs, is now somewhat fuzzily couched in the RICO statute, incorporating 18 U.S.C. § 659.

the enterprise."[10] In embracing this theory, however, the court overlooked the Supreme Court's insistence in this very case, among others, that the text of any statute controls its meaning. *See, e.g., U.S.* v. *Turkette*, 452 U.S. 576, 580 (1981); *Rusello* v. *U.S.*, 464 U.S. 16, 21 (1983). *See generally*, D. Shapiro, *Continuity and Chance in Statutory Interpretation*, 67 N.Y.U.L.Rev. 921, 922 ("Justices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration t the statutory text and its 'plain meaning'").

The plain terms of the Hobbs Act proscribe "obtaining" any "property" from another, with his consent, etc. through acts or threats of fear, force, or violence, etc. 18 U.S.C. § 1951(b)(2) so defines "extortion." Yet nowhere did plaintiffs ever allege, let alone prove, that any defendant or any other co-conspirator, etc. "obtained" any property from plaintiffs. *Oxford English Dictionary*, vol. 10, 669–70 (2d ed. 1989), tracing the uses of "obtain" through the history of our English tongue, yields as its principal sense "to come into the possession or enjoyment of [something] . . . to acquire [or] get." On the other hand, to "part with" signifies to "let go, give up [or] surrender." *Id.*, vol. 11, at 262. Nowhere is there any hint of defendants' coming into possession or enjoyment of anything by reason of their activism, but for the spiritual wages of altruism.[11] *See generally*, Bradley, *NOW* v. *Scheidler: RICO Meets The First Amendment, Supreme Court Review 1994*, 129, 138 *et seq.* (1995) ("The difficulty with NOW's complaint is that it fails to allege that the defendants 'obtained property' or attempted to obtain property from the plaintiffs . . . [T]his goes against the clear language of the Hobbs Act").

Nor did plaintiffs or the district court take account of the Hobbs Act's pedigree in New York law and the common law of extortion. Generally, words with a common law history will be accorded their common law meaning. *U.S.* v. *Turley*, 352 U.S. 407 (1957). *See* also, *U.S.* v. *Bailey*, 454 U.S. 394, 415 n.11 (1980) ("Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . ."); *Morissette* v. *U.S.*, 342 U.S. 246, 263 (1952) ("Where Congress borrows terms of art . . . It presumably knows and adopts the cluster of ideas that were attached to each borrowed word").

Not long ago, in *Evans* v. *U.S.*, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992), while addressing the "color of official right" branch of the Hobbs Act, rather than the branch at issue in *NOW* v. *Scheidler* ("wrongful use of actual or threatened force, violence, or fear"), what counts in a decisive way is that *all nine Justices agreed that the common law meaning of "extortion" controlled.*[12] The Justices differed in *Evans* only as to what "extortion" meant at common law, and thus what it meant under the Hobbs Act, to obtain another's property under color of official right. But in *NOW* v. *Scheidler*, there could be no plausible dispute over the fact that any New York statutory extortionist, or common law extortionist, had to take, or to acquire, or at least to demand from the victim, something of value for himself, or herself, or for his or her confederates or allies, in order to be held guilty of "obtaining property from another."

Where, as here, Congress borrowed the words of the Hobbs Act from a specific body of state law, it is presumed that it intended to adopt the particular construction placed on those words under that state law. *E.g., Metropolitan R. Co.* v. *Moore*, 121 U.S. 558, 572 (1887) ("construed in the sense in which they were understood at the time in that system from which they were taken"). The wording of the Hobbs Act derives from the New York Penal Code. *U.S.* v. *Enmons*, 410 U.S. 396, 406 n. 16 (1972). *See also, U.S.* v. *Addonizio*, 452 F.2d 49, 72 (3d Cir.) (citing *U.S.* v. *Nedley*, 255 F.2d 350, 355–58), and following New York law), *cert. den.*, 405 U.S. 936 (1972). In *Nedley*, the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous "taking" and that "robbery" in the Hobbs Act did not extend to "interference by force and violence with . . . lawful dominion and control," since no "taking" or not "intent to steal" could be shown. 255 F.2d at 347. The Court said:

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[10] The district court cited *U.S.* v. *Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), for its reliance on plaintiffs' "part with" theory. But in that case, defendants' intimidation of union members was part of a broader pattern of murder and extortion, including extortion of "labor peace" payments from truckers which also enabled defendants to secure and solidify their control and domination of the Local's affairs. Property was indeed "obtained" in abundance, as gifts and kickbacks abounded.

[11] Anent altruism, *see generally*, K. Monroe, *The Heart of Altruism: Perceptions of a Common Humanity* (Princeton, 1996) (contending that, contrary to traditional theories that tend to fold altruism back into concepts of self-interest, altruists view the world differently, seeing fellow buman beings instead of others' perception of strangers, etc.).

[12] The high Court did say in *Evans* that Hobbs Act extortion covers "acts by private individuals by which property is obtained by means of threats, force, or violence" (112 S.Ct. 1881, 1885 (1992)).

"We cannot subscribe to the proposition that Congress intended by the inclusion of the word "obtain" to scrap centuries-old concepts of the elements of a felony such as robbery and to obliterate requirements of 'taking' and 'carrying away' [or the appropriate state of mind]." 255 F.2d at 352.

The New York Field Code defined "extortion" as "obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." *Field Code*, §613 (1865). Under New York law, it is settled that an unlawful taking is required in the law of extortion. *People* v. *Whaley*, 6 Cow. 661, 662–3 (N.Y. 1827). *Accord, People* v. *Ryan*, 232 N.Y. 234, 235 (1921).

Moreover, the principle of lenity does apply to construction of any penal statute, such as Hobbs Act extortion, which becomes no less penal itself by virtue of its incorporation as a predicate offense within an overarching claim for RICO civil penalties.[13] *Compare, McNally* v. *U.S.*, 383 U.S. 346, 359–60 (1987) (to "defraud" under 18 U.S.C. §1341 does not include intangible rights) (courts should "choose the harsher construction only when Congress has spoken in clear and definite language"), citing *U.S.* v. *Bass*, 404 U.S. 336, 347 (1971); *Dowling* v. *U.S.*, 473 U.S. 207, 216–18 (1984) (bootleg phono records are not "goods" obtained by fraud) ("[w]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogative of Congress in defining a federal crime prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate," citing *U.S.* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment"). *See*, D. Shapiro, *supra* , 67 N.Y.U.L.Rev. 921, 935–36 (1992).

At the behest of plaintiffs, the district court misplaced reliance on many precedents, in glossing over the Hobbs Act's "obtaining property" requirement. *U.S.* v. *Frazier*, 560 F.2d 884, 887 (8th Cir. 1977), *cert. den.*, 435 U.S. 968 (1978), involved an extortionist's demand for $150,000 on threatening a bank officer with an "explosive belt." Money was delivered to a parking lot on defendant's instructions. Though no actual pick-up of the money was made, the court held it "not necessary to prove that the extortionist himself, either directly or indirectly, received the fruits of his extortion or any benefit thereof." But this hardly supports dispensing with the statutory requirement that there be some effort to "obtain" property, if not its actual receipt. Otherwise, mere vandalism would always rise to "extortion," and the distinct crimes of "coercion" and "extortion" would mutate into identical twins.

U.S. v. *Starks*, 515 F.2d 112 (3d Cir. 1975), concerned extortion of money in the guise of religious solicitation from donors. Nothing remotely similar occurred in *NOW* v. *Scheidler*.

U.S. v. *Anderson*, 716 F.2d 446 (7th Cir. 1983), is wholly off the point, inasmuch as the defendant, an Army of God member, extorted over $300 from his kidnap victim, telling him he "sought only money," and then talked with his co-abductors for the first two days' of their victims' captivity about how they would obtain yet more money. "Obtaining" wasn't an issue.

B. Plaintiffs' Expansive Theory of Extortion Flouts Constitutional Mandates— Without mounting any full dress constitutional argument, suffice it to say for present purposes that plaintiffs' expansive and elastic version of Hobbs Act extortion, as incorporated within their RICO claim, poses an unconstitutionally vague and overbroad threat of drastic penal or civil treble damage sanctions. From the street level perspective of any prospective demonstrator or demonstration leader, the impact is devastating, amounting to more of a sub-zero blast than any mere chilling effect. For the draconian perils of RICO liability now menace any form of "direct action," no matter how peaceably intended, directed, or managed, for there is always the inevitable risk that one or more protesters will either elect to engage in conscience-driven, self-sacrificial acts of civil disobedience, in order to dramatize or underscore their protest, or else cross some property line or engage in disorderly conduct. It is an old saw in the labor movement that nobody runs a perfect picket line. Some disorderliness, often provoked by outsiders or opponents, always must be expected. Once First Amendment protection may be lost, then the RICO-spectre arises, for street protests are redolent with "threats" that induce "fear" of economic loss, or worse, on the part of targeted commercial interests. Thus plaintiffs' theory in *NOW* v. *Scheidler* may transmute mere trespass, or disorderly conduct, or even the leadership of a demonstration planned to be perfectly lawful but involving some elements of disorderliness or unruliness, into crimes of racketeering and extortion.

[13] It would wreak a perverse form of Solomon's justice on any Act of Congress to halve it into civil and criminal counterparts, according a different meaning to each half, depending on whether the statute was being enforced in a civil or criminal case.

It is an axiom of statutory construction that legislation should not be construed so as to infringe on the exercise of First amendment rights, including demonstrations. *E.g., DeBartolo Corpo.* v. *Fla. Gulf Coast Bldg & Const.*, 108 S.Ct. 1392, 1397 (1988). Here, plaintiffs' sweepingly broad, amorphous concept of extortion will likely be exploited against all manner of protected speech, including picketing and demonstrations that might, indeed, induce "fear" of "economic loss." This over-inclusive version of extortion is fundamentally at odds with the constitutional mandate for "precision of regulation," *NAACP* v. *Claiborne Hardware*, 458 U.S. 886, 916 (1981), citing *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

C. Extortion Should Be Removed As A Predicate For Civil RICO—Dependence on the vagaries of federal litigation, in the context of highly-charged, hotly-contested political cases, for the purpose of curbing the perils bound up with plaintiffs' expansive theory of extortion, at the core of civil racketeering claims, is fraught with undue risk. The extortion predicate ought to be extirpated from civil RICO, root and branch, and forthwith. Criminal RICO, allied with criminal prosecution of extortion crimes, would amply suffice for purposes of securing the necessary social redress against truly extortionate practices of organized crime.

IV. EQUATING PEACEABLE, NON-VIOLENT ACTS OF CIVIL DISOBEDIENCE WITH THE CRIME OF EXTORTION RISKS CURTAILMENT OF OUR PRECIOUS LEGACY OF GRASSROOTS CITIZEN PROTEST

A great many individuals and groups of all political stripes and affiliations have risen up in protest against the application of plaintiffs' theory in *NOW* v. *Scheidler* for using the racketeering and extortion laws as a basis for seeking awards of treble damages, attorneys' fees, injunctions and other forms of judicial relief against protest groups and their leaders. It is no wonder that others have felt imperilled by virtue of what has occurred within this litigation, as plaintiffs themselves have trumpeted that their triumph "will have repercussions far beyond the reproductive rights arena," referring *inter alia* to RICO's application to other "extremist groups" that practice "terrorism . . . in many contexts," such as "zealots [who] stalk workers in medical laboratories," or "target people in fur coats," or indeed, "terrorize whaling ships." [14]

Among those who have testified for the *NOW* v. *Scheidler* defendants,[15] both to aver the indispensable role and value of conscientious acts of civil disobedience in calling society's attention to perceived fundamental social ills, and to spell out the chilling effect that they and their protest groups have felt, have been the following:

a) Dr. Michael Affleck, of Syracuse, New York, former international coordinator (1991–95) for Greenpeace International, including coordinating its pulp/paper and ozone campaigns (1992–96), who also served as its United Nations Delegation Head, and also founded the Nevada Desert Experience, a faith-based group that has engaged in protest and non-violent direct action against nuclear testing at the Nevada Test Site from 1981 to date;

b) James Douglass, theologian-activist and author (*The Non-Violent Cross, The Non-Violent Face Of God*, etc.) of Birmingham, Alabama, who testified to his co-founding (with his wife, Shelley) the Ground Zero Campaign for Non-Violent Action, a nationwide protest movement comprising persons who tracked and then picketed the Department of Energy's armed, armored, and heavily guarded "White Trains" that traveled from Pantex Corp. in Amarillo, Texas, final assembly plant for nuclear weapons, and delivered missiles to Trident naval bases on the coasts, each train reportedly carrying more explosive power than was unleashed during all of World War II;

c) Daniel Berrigan, S.J., of New York, New York, who has engaged in both abortion protest and peace protest and in protest against the death penalty, who is a poet and author of some 31 books and plays, and whose declaration relates two recent "successful" episodes of civil disobedience which not only won vindication for the protesters from two New York City judges but which also focused public attention upon serious social problems;

d) Rev. Michael Pfleger, Pastor of St. Sabina's Parish, 1210 West 78th Place, on Chicago's South Side, a self-described "Pastor, Preacher, Parent, Lecturer, Activist, and 'Errand Boy for Jesus,'" who has mobilized his parish and community in a se-

[14] F. Clayton, "RICO Reaches Non-Commercial Racketeers: *NOW* v. *Scheidler*" (December, 1994, pp. 17, 20).

[15] Some have testified in court, but owing to witness limitations and onerous requirements that witnesses travel to Chicago for deposition before being permitted to testify, many others had to submit sworn declarations for tender to the Court as offers of proof. Ms. Rider's declaration, however, was accepted, together with her deposition, in lieu of her testifying upon opposing counsel's agreement.

ries of protest crusades, sometimes involving peaceable non-violent direct action, including: an April, 1989 campaign with Fr. George Clements against drug paraphernalia, culminating in Illinois legislation; the foundation in June, 1989, of "Standing Up—Talking Back," a social action organization designed to combat crime, drugs, abandoned property, and to empower African-American communities; in May, 1990, an anti-Alcohol & Tobacco Billboard campaign culminated in reduction of such billboards from 118 to 40 in the Auburn-Gresham community; in January, 1991, Fr. Pfleger played a key role in the Anti-War campaign; in January, 1990, he opened a warming center for homeless women and children; on July, 1991, he was found not guilty in a jury trial on charges of criminal damage to property for allegedly defacing alcohol and tobacco billboards, on a plea of necessity to prevent saturation of alcohol and tobacco billboards; in June, 1991, he launched a public protest to condemn the planned marketing of high-alcohol malt liquor in the African-American community, product discontinued; in November, 1991, he led a one-day boycott of the C.T.A. to protest fare hikes and service cuts; in January, 1992, he exposed "witch-hunt" tactics of against Black males on the part of a nearby suburb's police force; in July, 1992, Fr. Pfleger executed a sting operation to identify vendors selling liquor to minors; in December, 1992, he persuaded over 60 neighborhood businesses to agree to reduce sales of tobacco and alcohol products in community stores; in June, 1994, he organized a protest against stores selling ink pens shaped like hypodermic needles; in August, 1994, culminating a 3 year battle against sale of grain alcohol or any alcohol over 152 proof, Fr. Pfleger won passage of a city-wide ban; in June, 1995, a beverage company agreed to redesign fruit drink bottles so as not to resemble liquor flasks; in November, 1995, a protest at Union Liquor led to cessation of distribution of alcoholic products marketed towards children, "tooters" and "tumblers"; in December, 1995, St. Sabina was host to the City's first sponsored "Safe Night," an alternative New Year's Eve celebration without liquor or tobacco; in May, 1996, the annual Chicago "Weedfest" was stopped, in which the City had tacitly permitted smoking marijuana; in June, 1996, Fr. Pfleger issued a warning to Seagram's Liquors not to advertise hard liquor on midwestern TV, which would've broken a 50 year voluntary ban; in July, 1996, Fr. Pfleger spoke out against disparate pricing and service on the part of a major retailer in African-American as opposed to white communities; in February, 1997, marketing of Camel Joe Menthol, aimed at African-American and Hispanic communities, was stopped in all Walgreen stores across the country; after many years' campaigning, the Chicago C.T.A. board finally voted to ban advertising of alcohol and tobacco products on public transportation; in February, 1998, 12 billboards were purchased to carry counter-advertising against liquor and tobacco ads; and finally, in April, 1998, Fr. Pfleger led a demonstration and negotiated with the distributor and producer of the Jerry Springer show, who agreed to end all acts of physical violence, effective June 8, 1998.

Appended hereto is an editorial from the Chicago *Sun-Times*, April 27, 1998, warning that Fr. Pfleger was risking RICO attack by virtue of his community-based protest against the Jerry Springer show, citing the verdict in *NOW* v. *Scheidler*, which had just been handed down.

e) Mary Rider, of Raleigh, North Carolina, the new Executive Director of the Seamless Garment Network, Inc., a coalition of persons and groups committed to protection of the life of unprotected persons, whose Declaration is appended hereto, but only with the first exhibit attached to it, namely, an advertisement which the Network had placed in the *New York Times* on March 27, 1994, to protest the Supreme Court decision in this case that RICO could be applied against protest groups, which was signed by many persons and groups, including *inter alii* Leonard Peltier, of the American Indian Movement, Joseph E. Lowery, of the Southern Christian Leadership Conference, the International Black Womens' Network, and the Fund For Animals, Inc.

We have also appended hereto a complete copy of Dr. King's famous Letter From The Birmingham Jail, first published roughly 35 years before return of the verdict in *NOW* v. *Scheidler* last April, 1998. Dr. King's letter proclaims with unsurpassed eloquence why conscientious acts of self-sacrificial civil disobedience will always accompany protest campaigns, crusades, or movements in service of some aspect of the cause of fundamental human rights.

This is not to say, of course, that civil disobedience ought to be immunized against legal sanction of any sort. By definition, the peaceable character of the protester's undertaking direct action entails a willingness to accept and endure whatever consequences may flow from that action, including any legal penalties that may be meted out.

But that is a far cry from having to incur the draconian sanctions that would flow from suffering liability, or a finding of guilt, for extortion and racketeering. Those

sanctions would deter not only those who would engage in civil disobedience themselves. More importantly, it is the RICO-spectre that would chill and deter even those who would lead lawful protest. For, again, given that some souls are conscience-driven to risk the sacrifice of their own freedom and/or fortune in service of a higher cause, protest leaders simply could not insure that violations of law would never occur. If the protest provoked fear of economic loss on the part of some protest target, then those law violations could be assailed as "extortion," and a pattern of two or more within any ten year period could, indeed, transform the RICO-spectre into the real thing.

A sampling of newspaper editorial reaction to the *NOW* v. *Scheidler* verdict is attached hereto, followed by another attachment comprising an exchange of letters between federal officials, on the one hand, including the Attorney General, Ms. Janet Reno, and David Harmon, Acting Supervisor, Enforcement Division, Office of Foreign Assets Control of the Treasury Department, and on the other hand, a young woman named Kathleen Kelly, who lives on Chicago's north side and heads up a national citizen's group called "Voices in the Wilderness." Ms. Kelly wrote Ms. Reno, on behalf of her group, "We the undersigned intend to deliberately violate the UN/US sanctions against the people of Iraq," on account of the sanctions' deadly impact on so many thousands of Iraqi children. When Mr. Harmon responded that such violation could entail criminal penalties up to 12 years in jail and $1 million in fines, Ms. Kelly wrote back, thanking Mr. Harmon "for the clarity of the warning," but insisting that "we will continue our effort to feed and care for the children and families of Iraq" and inviting him to "join us in our effort to lift the current sanctions against Iraq and end the cruel suffering endured by innocent people." Ms. Kelly's fiercely independent spirit epitomizes the character of so many persons who embrace protest movements. They represent the antithesis of "racketeers," those whose morals are mortgaged for the sole benefit of "the organization."

Also attached are a cover page and inside photo from the autobiography of NOW's president, Ms. Patricia Ireland. The photo depicts Ms. Ireland herself in handcuffs, "[i]n the tradition of the suffragists" "arrested outside the Bush White House as NOW began a campaign of nonviolent civil disobedience in support of abortion rights during the 1992 elections."[18] Was that an act of extortion or racketeering? Quite the contrary, it was a communicative act, designed to make a point in a most serious and solemn manner about what Ms. Ireland perceived to constitute a matter of fundamental human rights. It is regrettable, to say the least, that she will not credit the high motives and good intentions of those pro-life activists who have felt compelled to engage in civil disobedience in order to rescue unborn infants from imminent destruction. Instead, NOW lashes out with pejorative epithets about "thugs," "gangsters," "extortionists" and "racketeers."

V. NOW AND THE CLINICS DON'T NEED RICO REMEDIES AS THEY HAVE AMPLE REMEDIES AVAILABLE UNDER THE FACE LAW. IN ANY EVENT, THE SCHEIDLER DEFENDANTS ARE INNOCENT AND NON-VIOLENT

After the verdict was returned in *NOW* v. *Scheidler* late last April, the district court continued the case until the week of June 29th, when a three-day hearing was held on plaintiffs' prayer for entry of a nationwide injunction. On conclusion of that hearing, a briefing schedule was set to run through September, 1998, on a variety of pending issues, including as to what form the judgment should take if the district court enters one on the verdict.

On July 2, 1998, when the injunction hearing was drawing to a close two weeks ago, after the proofs had been closed, Ms. Clayton announced that the plaintiffs were moving for leave to amend their complaint, to add another new claim under the federal Freedom of Access to Clinic Entrances Act ("FACE"). Thus if, for example, the district court held that RICO afforded no statutory basis for entry of an injunction at the behest of private plaintiffs, plaintiffs would shift gears and ask that such an injunction be entered under FACE instead.

Plaintiffs' belated amendment tacitly conceded that their preexisting remedy, under the FACE Act, amply sufficed for any relief they might profess to require on account of clinic blockades or any other interference with abortion rights. The proposed judgment and injunction remedy under RICO and the Hobbs Act are really superfluous and unnecessary. At the same time, the mere pendency of this RICO litigation continues to generate extremes of chilling effect among hosts of potential RICO defendants.

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[18] Also attached is a *New York Times* article, dated July 3, 1992, around the same time as Ms. Ireland's civil disobedience, relating how 140 abortion rights supporters attempted to close down the Holland Tunnel by staging a sit-in there.

Finally, the simple, stark truth is that, notwithstanding all of plaintiffs' charges and rhetoric, the defendants in *NOW* vs. *Scheidler* are all peaceable and non-violent. Indeed, they no longer engage in acts of civil disobedience, owing primarily to the draconian penalties provided under FACE. Page 216 of Ms. Ireland's book, copy attached, reflects the clinic blockades had plummeted from 1988 to 1990. When FACE was passed later during the 1990's, the blockades virtually disappeared. Nobody with a family can now afford to be arrested, for fear of protracted incarceration and loss of livelihood. We close, moreover, with Chapter 81 from Scheidler's book, against violence, and other examples of League advocacy against violence.

THOMAS BREJCHA, *Defense Counsel,*
NOW v. *Scheidler*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Plaintiffs,

vs.

JOSEPH M. SCHEIDLER, et al.,

Defendants.

86 C 7888

Hon. David Coar,
U.S. District Judge

DECLARATION OF DANIEL BERRIGAN, S.J.

Daniel Berrigan, S.J., on oath or affirmation, declares the following:

1. I am a member of the Society of Jesus, as well as a citizen of the United States of America, the State of New York, and the City of New York, residing at 220 West 98th Street, New York, New York 10025.

2. I am not in the best of health and, while I had intended to come to Chicago to testify at the earlier phase of the trial in the captioned lawsuit, before the jury, I was advised by my physician that I could not, and should not, make the trip owing to problems with my back. Today, on Monday, June 22, 1998, I was to be deposed at my place of residence as a prospective witness for the defense at the next phase of the trial, for the hearing next week, on June 30th, and July 1st and 2d, on the plaintiffs' motion that this Court enter a nationwide "racketeering injunction." I am advised, however, that this deposition was quashed on plaintiffs' objection that defense witnesses should come twice to Chicago, once this week for deposition, and once next week for the actual testimony at trial. This I simply cannot do, owing not only to my health but to many other commitments here in New York City.

3. Thus I make this Declaration for the purpose of setting forth those matters to which, were I allowed to testify as a defense witness against the proposed racketeering injunction, I would freely testify of my own personal knowledge.

4. I am a priest, teacher, writer, poet, and playwright, having authored or co-authored at least thirty-one published volumes and many other works. But I have also been engaged for many years as a participant and leader in non-violent protest against many forms of injustice and violence that plague our society and pose real and extreme perils for human beings who inhabit our planet. Three works, two of which I wrote, which both chronicle and explain what I have done in this regard, are contained in Defendants' Group Exhibit 301, including my play, *The Trial of the Catonsville Nine* (1970), DX301A, my autobiography, *To Dwell In Peace* (1987), DX301B, and a more recently published biography of my brother, Philip Berrigan, and me, *Disarmed & Dangerous* (1997). Also, I wrote the Foreword to another book by my fellow Jesuit, John Dear, S.J., entitled, *The Sacrament of Civil Disobedience* (1994), which has been marked as DX205.

5. What must be clear at the outset is that those who engage in non-violent protest, following the methods of Mahatma Gandhi as adapted in this country by the Rev. Dr. Martin Luther King, as elaborated in his *Letter From the Birmingham Jail* (DX116, ch. 5, 4/16/63), is that efforts ought to be made first to secure relief by lawful means and that every effort must be made to exhaust available legal remedies. Thus in our protests we have always engaged in letter writing, interviews with legal officials, visits to agencies, and legal devices of all sorts in pursuit of government action, and we consider it necessary to resort to peaceable non-violent direct action

involving acts of civil disobedience only when it becomes plain that officials remain deaf and blind to our plea. Indeed, we believe that, as both citizens and as people of God, we owe a fiduciary duty to violate any law that is unjust, including, for example, those laws that would provide for the destruction of unborn human beings through abortion, or for the destruction of convicted felons through capital punishment, or for the pursuit of genocidal wars.

6. Thus my brother, Phil, and I spent years and years acting within the law, conducting wholly lawful forms of protest and outspoken challenge to government policies that we perceived to be fundamentally wrong and immoral. This was true of our opposition to the Vietnam War. While we had grave concerns earlier, by 1965 we realized that we would have to speak up, that the war would bring terrible tragedy to the people of our country and to the people of Southeast Asia and elsewhere. Yet, it was not until after three tense years had passed, in which we had ceaselessly, yet fruitlessly, sought legal remedies, that we undertook direct action that involved civil disobedience at Catonsville, Maryland.

7. My experience with the abortion issue has been analogous. We approached people and sought peaceful discussion, we engaged in letter writing, we listened, we read extensively. Only when these efforts proved fruitless and the destruction of unborn human lives persisted did I join others in acts of civil disobedience against abortion. These demonstrations occurred in Rochester, New York, and while one involved a sit-in at a hospital where abortions were performed, the other involved blocking access to an abortion clinic. The latter direct action resulted in my arrest, while I risked arrest at the hospital sit-in, although no arrests were made.

8. My protesting and involvement in acts of civil disobedience against the evil of abortion, equally as my speaking out in protest against the Vietnam War, or my engagement in civil disobedience in efforts to stop that war and turn public opinion against it, were spurred by the dictates of my own conscience, not by any command or direction by anyone else. The same is true of my continuing efforts in protest against other social evils. No *fiat* or order of any higher-up or *capo* has anything to do with the decisions of citizens to engage in peaceable, nonviolent direct action. The Suggestion that demonstrators have acted as if "street level foot-soldiers" for some Mafioso chieftan in undertaking civil disobedience is ludicrous. All that one might gain or profit by reason of obedience to conscience and God's law is his or her soul's salvation and the sense of doing one's best for the sake of humankind, not any spoils of racketeering.

9. Civil disobedience has played a critical role on many occasions during our nation's history. The civil rights revolution of the 1960's, which remains ongoing, and our country's agonizingly slow withdrawal from Southeast Asia, afford but two of the more recent examples.

10. Peaceable, non-violent acts of civil disobedience continues to play a vital role in awakening officials to social evils and in helping to bring about actual social improvements. Recently, I participated in a protest against Riverside Research Institute, a militarist institution here in New York City which has been engaged in perilous nuclear research. My protest involved participating in blocking of access. We were brought before a Judge on trespass charges. The Judge inquired what our protest concerned and, on our telling him, he stated that he too was concerned about the issues we raised. He inquired whether we had been violent. On learning that we had planned and carried out our protest in an entirely non-violent manner, he held that we had been within our rights. We were not convicted, but rather vindicated. This is the point of protest from the standpoint of good citizens. It is wrong to equate any form of morally-grounded protest on the part of concerned citizens, which is carried out in good faith and in a peaceable and non-violent manner, with the federal crimes of extortion and racketeering.

11. Our vindication in protesting against the Riverside Research Institute was not an isolated or non-recurring event. Another anti-militarist protest was carried out a while earlier here against the use of the *S.S. Intrepid* exhibit (a drydocked aircraft carrier open to the public) as a means of inculcating murderous intent in our children. We learned that video machines had been installed in which New York youngsters were learning and then practicing how to bomb the children in Iraq. We called this "war pornography" and staged a demonstration to protest it, which included some civil disobedience to call attention to this horror. When the protesters were brought before the Judge in the New York court, after hearing from the defense, the Judge held, in these or similar words, "In the interest of justice, the case is dismissed. These people were exercising their First Amendment rights." Moreover, during the proceedings some mention had been made of photos of Iraqui children, suffering the awful effects of our years of quarantine against that country and its citizens, including its ill and needy children. The Judge asked if he had heard correctly that somebody in the courtroom had photos of these suffering Iraqui children. When

the photos were handed over, the Judge examined them carefully. Then he asked if he could keep them, as he wanted immediately to send them for appropriate action by the proper authorities. Thus this protest bore immediate fruit, twice over, inasmuch as the subject matter of our protest came to public attention and won judicial approbation as well as judicial action. Powerless in so many other ways as against our vast bureaucratic and behemoth government institutions, citizens may yet find a voice, when all other avenues fail them, through their last resort of peaceable, non-violent direct action involving solemn acts of civil disobedience.

12. There is no question but that news of the prospect of a nationwide injunction against the defendants in this case and those in active concert or participation with them, banning them on pain of contempt of court from engaging in any unlawful conduct in the course of social protest, has had a vast chilling effect on protesters of all stripes throughout this nation. On every occasion when I have mounted a protest, I took a risk that I would be arrested and punished. On occasion the punishment proved severe. But I took my punishment, without risking sanction as any extortionist or racketeer. I did all I could to foster non-violence on the part of all involved in the demonstration, but that was not because I feared being held answerable for anything that anybody connected with our protest might accomplish. It was, rather, because our shared commitment to the ethic of non-violence required that we endeavor to conduct our action in the proper frame of mind. Now, however, the Chicago racketeering verdict, as this case is commonly referred to, threatens to teach protesters a new lesson, namely, that they bear legal for anything that anybody who joins in their protest might do, whether it was authorized or not, or whether it was contrary to their pledge or instruction or not. Moreover, when sit-ins disrupt a business, that business may now collect triple damages from those seeking to call attention to the peril it poses for the common good. This not only emits a chilling effect on protesters everywhere, worse it generates a sub-zero blast. No such nationwide injunction should be issued here, as it was never issued during the civil rights protests nor the Vietnam protests through the 1960's and early 70's. Such an injunction would only carry over from the abortion arena to all other areas of social concern and would seriously curtail, if not eradicate, a precious legacy of civil, peaceful protest that, until now, our nation has cherished and fostered.

Subscribed and sworn to this 23 day of June, 1998, under penalty of perjury and pursuant to the laws of the United States of America.

DANIEL BERRIGAN, S.J.

Monday, April 27, 1998

COMMENTARY

Chicago Sun-Times
An Independent Newspaper

Protesters beware

So hated is "The Jerry Springer Show" that the Rev. Michael Pfleger, leading a group of people protesting that it will be carried on WFLD-Channel 32, proclaimed: "Either we're going to get [the Springer show] thrown off [Channel] 32, or we're going to shut down the station."

Sounds like a threat to us, maybe even extortion.

We are not lawyers, but we have a piece of legal advice for Pfleger: Last Monday, a federal jury found three anti-abortion activists guilty of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act for scheming to shut abortion clinics through illegal acts. The law originally was passed to combat organized crime, but over the objections of some legal experts, and us, it is being applied to social and political protest.

All it takes is two illegal acts, and any protest group, such as Pfleger's, can be hauled into court just as if they were mobsters and drug dealers. Those acts could include trespass, disorderly conduct, assault, vandalism, disturbing the peace, blockading an entrance or any of a number of other crimes slipped into by protesters engaged in direct action or civil disobedience. Just two arrests, and you are on the hot seat.

Like Springer or not, defend Channel 32's right to air such programs or not, but if you show up to demonstrate and misbehave, you will not face just arrest for what you did wrong, as you should, but you also can be legally regarded as the equivalent of Al Capone, deserving to lose your house, car and savings.

And your First Amendment rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., etc., et al.,	)	
Plaintiffs,	)	NO. 86 C 7888
vs.	)	Hon. David Coar,
JOSEPH SCHEIDLER, et al.,	)	U.S. District Judge
Defendants.	)	

DECLARATION OF MARY RIDER

Mary Rider hereby declares:

1. I am a resident of Raleigh, North Carolina, residing at 6615 Old Stage road, Raleigh, NC 27603, and I am making this Declaration to supplement the contents of my deposition, which was taken in this case on July 1, 1998, in Judge Coar's Attorney/Witness Room, at Suite 1416, 219 South Dearborn Street, Chicago, Illinois. While I came to Chicago to testify in this case, accompanied (necessarily) by my daughter (approximately 18 months old), it is now my understanding that the Court has requested that only one witness be named to testify for the defendants with regard to the chilling effects of any injunction that might be entered in this case under RICO against protesters, including not only pro-life protesters who may have conducted their protest activity, from time to time, in concert with the defendants, but also against protesters who have not worked in concert with defendants on pro-life matters or who focus and aim their protest at different issues. Therefore, before returning to Raleigh, I am tendering this Declaration as well as the contents of my deposition in lieu of testifying in open court.

2. At pp. 53-55 of my deposition, I testified to the chilling effect that entry of any RICO injunction in this case would have, inasmuch as there are already laws on the books outlawing various sorts of criminal or tortious conduct that my questioner, Mr. Block, asked me about, and entry of the RICO injunction would only "up the ante of those actions," as I testified, and deter me from engaging in any sort of civil disobedience. But I further testified that I have engaged in hundreds of non-civilly disobedient protests, and I must clarify that I believe that entry of any RICO injunction in this case would also chill and deter me from engaging in lawful protests too. For example, at p. 36, I testified about the possibility of an injunction against so-called "violent speech," which would pose the problem of defining what might be treated as "violent". I cited the example of saying, "Abortion is murder," which some people characterize as "violent speech." Yet I hear that

the New York Times reported the results of a national poll last January, 1998, in which over 50% of the respondents voiced agreement with the proposition that, indeed, "abortion is murder," even while affirming that the law should still protect a woman's choice to have an abortion if she so desired. Words have unpredictable meanings when they are interpreted in the context of disputes over abortion rights. Predicting legal outcomes is fraught with more difficulty in this area than in most other areas.

3. Throughout the deposition, I testified that I had not seen a copy of the injunction plaintiffs are seeking. I have been advised now that, according to the Court's ruling yesterday, when my deposition was taken, the injunction was basically to be the same or similar to the consent injunction agreed to by Randall Terry. I am told, further, that he was to be enjoined from "encouraging," or "organizing," or "inciting" any violation of "federal, state, local, or common law" anywhere in the U.S. around an abortion clinic. This would pose significant uncertainty for me, as I testified at the deposition, given that these words are broad and might be defined to include urging that "abortion is murder" and, therefore, ought to be treated as such, which some might well take to constitute "encouraging" somebody else to violate a trespass or other law to avert a murder. Also, since there is no readily available guide as to precisely what all those laws might forbid at any clinic site, the most prudent response, many potential protesters and demonstrators might well conclude, is to forego demonstrating at any clinic, lest they find themselves saddled with a contempt charge.

4. I'm further advised that the Terry injunction prohibits participating in any racketeering enterprise and that the jury found here that the Pro-Life Action Network (PLAN) was such a racketeering enterprise. If any judgment were entered on that verdict, I would be hard pressed to determine where the line would be drawn that would regulate my conduct with respect to PLAN. While I truthfully testified at p. 43 of my deposition that I never attended a demonstration that was organized by PLAN, as the coordinator of Pro-Lifers for Survival, about which I testified earlier, at pp. 16-17 et seq., I did attend the initial organizing conference for PLAN at Appleton, Wisconsin. There was no demonstration at that conference that I recall. I did meet Joseph Scheidler there, and I recall hearing him give a speech. While I do not recall many details about that meeting, I distinctly recall that I neither saw nor heard any advocacy, let alone any agreement, for pro-life tactics constituting anything other than non-violent forms of protest, for if I had heard any such advocacy or agreement, I would have objected to it in the strongest terms and left the meeting, which I did not do. Would entry of the injunction plaintiffs seek against defendants' participation in any racketeering enterprise prevent them from working with me on any pro-life project, inasmuch as I'd met Scheidler through PLAN? Was everything that Pro-Lifers for Survival did after I attended the PLAN convention in 1985 considered, as a matter of law, as a "PLAN action"? Would plaintiffs contend that, because the Seamless Garment Network ("SGN") grew out of a meeting called by Pro-Lifers for Survival, as I testified at p. 22, are plaintiffs claiming that SGN is part of PLAN and covered by any RICO injunction relating to PLAN? This to me seems to be an extreme form of "guilt by association," that would chill all but the most robust and courageous individuals with a strong sense of their constitutional entitlements from banding together

with any person or group that ever had anything to do with PLAN, thus spreading taint and deterrence about the pro-life movement as if contagious diseases.

5. As the new Executive Director of the Seamless Garment Network, I am especially sensitive to the difficulty inherent in organizing and building associations of grassroots citizen protesters. Banding together with fellow citizens in pursuit of some social or political goal is always fraught with risks and uncertainties that are bridged by faith, trust, and commitment to the overriding common cause. No organizer or leader of any such group can insure obedience or fidelity on the part of all of its adherents or fellow travelers. Each must always bear ultimate responsibility for his or her own actions. Saddling leaders with legal responsibility for law violations on the part of anybody associated with such associations or groups in the teeth of signed pledges or express directions would not merely chill the exercise of the right to free association for social, political, and religious purposes, it would generate a sub-zero blast. Appended hereto is a copy of an advertisement, entitled "Sub-Zero Blast Against Conscientious Protest," published by the Seamless Garment Network, in reaction to the RICO decision in this case, that highlights our many other objections to this use of RICO against protest groups.

6. Furthermore, I am also appending to this Declaration a copy of my biography that highlights other aspects of my experience than I'd testified to at the deposition, including my work as a "mitigation specialist" on behalf of death penalty candidates among indigent prisoners in North Carolina and my position as a Board member of People of Faith Against the Death Penalty, among other endeavors and positions. And finally, only in order to add dimension to this report of my activities and to bolster my testimony against this skewed application of the RICO statute against protesters, I also append an article from a local publication, The Independent Weekly, relating an award given to my husband, Patrick O'Neill, and me, on account of our service to the community in which we live.

Subscribed and sworn to before me this 2nd day of July, 1998, under penalty of perjury pursuant to the laws of the United States of America.

Mary S. Rider

NY Times Opinion Page 3/27/

A Sub-Zero Blast Against Conscientious Protest

On January 24th, the United States Supreme Court ruled in National Organization of Women v. Joseph M. Scheidler (No. 92-780), that the Racketeer Influenced and Corrupt Organizations Act (RICO) can be applied to activities of various antiabortion groups even though no financial gain is involved. This decision constitutes a draconian measure for strangling social and political dissent.

An amicus brief filed by animal rights activists, homeless advocates and environmentalists, warned that an overbroad interpretation of RICO would surely precipitate an unwarranted interference in political and social advocacy, interference never intended by Congress when it enacted RICO.

We, the undersigned are organizations and individuals who advocate political change through lawful means. We also believe that social dissent - including non-violent civil disobedience - has always played a crucial role in shaping our society. The Court's new interpretation of RICO may replace appropriate sanctions for civil disobedience with severe penalties originally designed to punish truly dangerous criminal activity.

Prosecutors and civil plaintiffs opposed to social change, or to a particular social conviction, now possess an ominous weapon for silencing unpopular causes - many of which we endorse. We have no doubt they will use this weapon.

The value of radical protest is easier to recognize when the protestor's position is more broadly received and incorporated into law. The classic example is slavery. Abolitionists were radical in their time and accused of being unaccommodating. But this view overlooked the rigid mindset of slaveholders who would brook no compromise on the matter of slavery as an inalienable property right.

Today's interpretation of RICO could have served as a deterrent to crush the abolitionists efforts to end slavery. Moreover, the courageous actions of Dr. Martin Luther King Jr., and others engaged in the modern civil rights movement, might well have fallen under the present interpretation of RICO.

Contrary to assertions made by NOW's Legal Defense Fund, the impact of expanding RICO will not be limited to violent activity. It can and will be applied to a broad spectrum of non-violent civil disobedience. The application of federal racketeering laws against protestors is a frightful assault against First Amendment guarantees of free speech.

Partial list of endorsers. AFFILIATIONS ARE FOR IDENTIFICATION ONLY.

Rev. Bernice A. King, Daughter of Martin Luther King, Jr
Ramsey Clark, Former U.S. Attorney General
Martin Sheen, Actor
Mike Affleck, Ph.D., Founder, Nevada Desert Experience
Erwin Knoll, Editor, *The Progressive*
Gail Grenier Sweet, Director, HOPE Network, Inc.
Paul Magno, Peter Maurin Institute
Rachel Conn, Director, Brookline Women's Shelter, Boston
Catherine Meeks, Ph.D., African-American Studies, Mercer
Bob & Janet Aldridge, Authors, *Children and Non-Violence*
Richard McSorley, Dir., Center For Peace Studies, Georgetown
R. & B. Broussard, Founders, Human Relations Council, LA
G. Robert Blakey, original drafter of RICO, Notre Dame
Antonio Ramirez, Labor Editor
Bonnie Urfer, NukeWatch
Bruce Ledewitz, Professor of Law, Duquesne University
Dr. Maureen Jones-Ryan, Executive Director
Sexual Assault and Recovery Institute
Ellen Flanders, Clerk, Latin American Concerns, Society of Friends
Amy Schablitz, Director,
Ecumenical Council Task Force for Central America, Tucson, AZ
Henri Nouwen, L'Arche Community
Mary Hutchison, NW Indiana Peacemaker Award
Joseph Nangle, Cry for Justice, Haitian Solidarity Movement
Liz McAlister, Phillip Berrigan, John Dear, Sam Day, Daniel Berrigan, Art Laffin, Anne Montgomery, Shelly Douglass, Marcia Timmel - Plowshares Activists
Lawrence Martin Jenco, SM, Former Iranian Hostage
Leonard Peltier, American Indian Movement
Joseph E. Lowery, President,
Southern Christian Leadership Conference (S.C.L.C.)
Roy Bourgeios, MM, School of the Americas Watch
Marietta Jaeger & William Pelke
Murder Victims Families For Reconciliation
Elena Mueller-Garcia, columnist, *La Voz*, Miami
John Fife, 199) Moderator, General Assembly,
Presbyterian Church USA
Consuelo Beck-Sague', National Health Care Professional
Will D. Campbell, Civil Rights Leader
Lilibeth Navarro, CA Association of Persons With Handicaps
Scott Schaeffer-Duffy, International Coordinator SIEME
Anita McGlynn, Arts Director, NYC
Molly Rush, The Thomas Merton Center
Ernest G. Hernandez, D/Advisor, Civil Rights Commission
Jean Blackwood, Poet
Lois Yake-Kenagy, PPC Peace & Justice Mennonite Church
Lana Jacobs, Companions of Shalom; Martin Luther King Award
Don Bauer, NYS Labor and Religion Council
Suzanne Schaitman, Ph.D., Women's Studies Professor
Sandra Schaleders, I.H.M., Feminist and Theologian
A. J. McKnight, Dir. Southern Cooperative Development Fund
Bob Gross, Coordinator, Journey of Hope
Mark Brown, MD, Medical Director
Martin Luther King Center, Rochester, NY
Marie Dennis, Maryknoll Justice and Peace
Wendell Berry, Author, Environmentalist

• International Black Women's Network • Professional Women's Network • Fund For Animals, Inc • Casa Juan Diego •
• Women For Women • Center on Law & Community • New Hope House • Open Door Community • Koinonia Partners •
•People For The Ethical Treatment of Animals (PETA) • Common Ground of Upstate New York, Inc. •
•ProLife Alliance of Gays and Lesbians (PLAGL), Wash., DC • The Catholic Peace Fellowship • The Seneca Campaign •
• Fossil Fuels Policy Action Institute • Northcoast Earth First • People For Urban Justice (Atlanta) • Anti-Facist Network •
• The Committee Witnesses For Reconciliation (formerly The Committee of Southern Churchmen) • Jubilee Partners •
• Georgia Death Penalty Abolitionists • Center on Action and Contemplation • The Peace Community of Chicago •

This ad was coordinated by the Seamless Garment Network, Inc., which promotes a consistent life ethic. Not all the endorsers listed above are members of the Seamless Garment Network, Inc., however all support the views affirmed in this advertisement.

The Seamless Garment Network, Inc. 109 Pickwick Dr. Rochester, NY 14618 716 - 442 - 8497

LETTER FROM BIRMINGHAM JAIL

My Dear Fellow Clergymen:

While confined here in the Birmingham city jail, I came across your recent statement calling my present activities "unwise and untimely." Seldom do I pause to answer criticism of my work and ideas. If I sought to answer all the criticisms that cross my desk, my secretaries would have little time for anything other than such correspondence in the course of the day, and I would have no time for constructive work. But since I feel that you are men of genuine good will and that your criticisms are sincerely set forth, I want to try to answer your statement in what I hope will be patient and reasonable terms.

I think I should indicate why I am here in Birmingham, since you have been influenced by the view which argues against, "outsiders coming in." I have the honor of serving as president of the Southern Christian Leadership Conference, an organization operating in every southern state, with headquarters in Atlanta, Georgia. We have some eighty-five affiliated organizations across the South, and one of them is the Alabama Christian Movement for Human Rights. Frequently we share staff, educational, and financial resources with our affiliates. Several months ago the affiliate here in Birmingham asked us to be on call to engage in a nonviolent direct-action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promise. So I, along with several members of my staff, am here because I was invited here. I am here because I have organizational ties here.

But most basically, I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their "thus saith the Lord" far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco-Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a

threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never by considered an outsider anywhere within its bounds.

You deplore the demonstrations taking place in Birmingham. But your statement, I am sorry to say, fails to express a similar concern for the conditions that brought about the demonstrations. I am sure that none of you would want to rest content with the superficial kind of social analysis that deals merely with effects and does not grapple with underlying causes. It is unfortunate that demonstrations are taking place in Birmingham, but it is even more unfortunate that the city's white power structure left the Negro community with no alternative.

In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self-purification; and direct action. We have gone through all these steps in Birmingham. There can be no gain, saying the fact that racial injustice engulfs this community. Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of brutality is widely known. Negroes have experienced grossly unjust treatment in the courts. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in the nation. These are the hard, brutal facts of the case. On the basis of these conditions, Negro leaders sought to negotiate with the city fathers. But the latter consistently refused to engage in good-faith negotiation.

Then, last September, came the opportunity to talk with leaders of Birmingham's economic community. In the course of the negotiations, certain promises were made by the merchants, for example, to remove the stores humiliating racial signs. On the basis of these promises, the Reverend Fred Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to a moratorium on all demonstrations. As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained.

As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us. We had no alternative except to prepare for direct action, whereby we would

present out very bodies as a means of laying our case before the conscience of the local and the national community. Mindful of the difficulties involved, we decided to undertake a process of self-purification. We began a series of workshops on nonviolence, and we repeatedly asked ourselves, "Are you able to accept blows without retaliation?" "Are you able to endure the ordeal of jail?" We decided to schedule our direct-action program for the Easter season, realizing that except for Christmas, this is the main shopping period of the year. Knowing that a strong economic-withdrawal program would be the by-product of direct action, we felt that this would be the best time to bring pressure to bear on the merchants for the needed change.

Then it occurred to us that Birmingham's mayoral election was coming up in March, and we speedily decided to postpone action until after election day. When we discovered that the Commissioner of Public Safety, Eugene "Bull" Connor, had piled up enough votes to be in the run-off, we decided again to postpone action until the day after the run-off so that the demonstrations could not be used to cloud the issues. Like many others, we waited to see Mr. Connor defeated, and to this end we endured postponement after postponement. Having aided in this community need, we felt that our direct-action program could be delayed no longer.

You may well ask, "Why direct action? Why sit-ins, marches, and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiations. Indeed, this is the very purpose of direct action. Nonviolent direct actions seek to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the nonviolent-resister may sound rather shocking. But I must confess that I am not afraid of the word "tension". I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so much we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.

The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation. I

therefore concur with you in your call for negotiation. Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue.

One of the basic points in your statement is that the action that I and my associates have taken in Birmingham is untimely. Some have asked: "Why didn't you give the new city administration time to act?" The only answer that I can give to this query is that the new Birmingham administration must be prodded about as much as the outgoing one, before it will act. We are sadly mistaken if we feel that the election of Albert Boutwell as mayor will bring the millennium to Birmingham. While Mr Boutwell is a much more gentle person than Mr. Connor, they are both segregationists, dedicated to maintenance of the status quo. I have hoped that Mr. Boutwell will be reasonable enough to see the futility of massive resistance to desegregation. But he will not see this without pressure from devotees of civil rights. My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is a historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.

We know through painful experience that freedom is never voluntarily given by the oppressor, it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was "well-timed" in view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never," We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

We have waited for more than 340 years for our constitutional and God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at a horse-and-buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim ; when you have seen hate-filled policemen curse, kick, and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an

airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year old daughter why she cannot go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five-year-old son who is asking, "Daddy, why do white people treat colored people so mean?"; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of "nobodiness" - then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair. I hope sirs, you can understand our legitimate and unavoidable impatience.

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that, "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the

terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregate a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically, and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.

Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?

Sometimes a law is just on its face and unjust in its application. For instance, I have been arrested on a charge of parading without a permit. Now there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First Amendment privileges of peaceful assembly and protest.

I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid

segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Of course, there is nothing new about this kind of civil disobedience. It was evidenced sublimely in the refusal of Shadrach, Meshach, and Abednego to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks rather than submit to certain unjust laws of the Roman Empire. To a degree, academic freedom is a reality today because Socrates practiced civil disobedience. In our own nation, the Boston Tea Party represented a massive act of civil disobedience.

We should never forget that everything Adolf Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. Even so, I am sure that, had I lived in Germany at the time, I would have aided and comforted my Jewish brothers. If today I lived in a Communist country where certain principles dear to the Christian faith are suppressed, I would openly advocate disobeying that country's anti-religious laws.

I must make two honest confessions to you, my Christian and Jewish brothers. First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice and that when they fail in this purpose they become the dangerously structured dams that block the flow of social progress. I had hoped that the white moderate would understand that the present tension in the South is a necessary phase of the transition from an obnoxious negative peace, in which the Negro passively accepted his unjust plight, to a substantive and positive peace, in which all men will respect the dignity and worth of human personality. Actually, we who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with. Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion, before it can be cured.

In your statement you assert that our actions, even though peaceful, must be condemned because they precipitate violence. But is this a logical assertion? Isn't this like condemning a robbed man because his possession of money precipitated the evil act of robbery? Isn't this like condemning Socrates because his unswerving commitment to truth and his philosophical inquiries precipitated the act by the misguided populace in which they made him drink hemlock? Isn't this like condemning Jesus because his unique God-consciousness and never-ceasing devotion to God's will precipitated the evil act of crucifixion? We must come to see that, as the federal courts have consistently affirmed, it is wrong to urge an individual to cease his efforts to gain his basic constitutional rights because the quest may precipitate violence. Society must protect the robbed and punish the robber.

I had also hoped that the white moderate would reject the myth concerning time in relation to the struggle for freedom. I have just received a letter from a white brother in Texas. He writes, "All Christians know that the colored people will receive equal rights eventually, but it is possible that you are in too great a religious hurry. It has taken Christianity almost two thousand years to accomplish what it has. The teachings of Christ take time to come to earth." Such an attitude stems from a tragic misconception of time, from the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually, time itself is neutral; it can be used either destructively or constructively. More and more I

feel that the people of ill will have used time much more effectively than have the people of good will. We will have to repent in this generation not merely for the hateful words and actions of the bad people, but for the appalling silence of the good people. Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co-workers with God, and without this hard work, time itself becomes an ally of the forces of stagnation. We must use time creatively, in the knowledge that the time is always ripe to do right. Now is the time to make real the promise of democracy and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.

You speak of our activity in Birmingham as extreme. At first I was rather disappointed that fellow clergymen would see my nonviolent efforts as those of an extremist. I began thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency, made up in part of Negroes who, as a result of long years of oppression, are so drained of self-respect and a sense of "somebodiness" that they have adjusted to segregation, and in part of a few middle-class Negroes who, because of a degree of academic and economic security and because in some ways they profit by segregation, have become insensitive to the problems of the masses. The other force is one of bitterness and hatred, and it comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up across the nation, the largest and best known being Elijah Muhammad's Muslim movement. Nourished by the Negro's frustration over the continued existence of racial discrimination, this movement is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible "devil."

I have tried to stand between these two forces, saying that we need emulate neither the "do-nothingism" of the complacent nor the hatred and despair of the black nationalist. For there is the more excellent way of love and nonviolent protest. I am grateful to God that, through the influence of the Negro church, the way of nonviolence became an integral part of our struggle.

If this philosophy has not emerged, by now many streets of the South would, I am convinced, be flowing with blood. And I am further convinced that if our white brothers dismiss as "rabble-rousers" and "outside agitators" those of us who employ nonviolent direct action,

and if they refuse to support our nonviolent efforts, millions of Negroes will, out of frustration and despair, seek solace and security in black-nationalist ideologies - a development that would inevitably lead to a frightening racial nightmare.

Oppressed people cannot remain oppressed forever. The yearning for freedom eventually manifests itself, and that is what has happened to the American Negro. Something within has reminded him of his birthright of freedom, and something without has reminded him that it can be gained. Consciously or unconsciously, he has been caught up by the *Zeitgeist*, and with his black brothers of Africa and his brown and yellow brothers of Asia, South America, and the Caribbean, the United States Negro is moving with a sense of great urgency toward the promised land of racial justice. If one recognizes this vital urge that has engulfed the Negro community, one should readily understand why public demonstrations are taking place. The Negro has many pent-up resentments and latent frustrations, and he must release them. So let him march; let him make prayer pilgrimages to the city hall; let him go on freedom rides - and try to understand why he must do so. If his repressed emotions are not released in nonviolent ways, they will seek expression through violence; this is not a threat but a fact of history. So I have not said to my people, "Get rid of your discontent." Rather, I have tried to say that this normal and healthy discontent can be channeled into the creative outlet of nonviolent direct action. And now this approach is being termed extremist.

But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you." Was not Amos an extremist for justice: "Let justice roll down like waters and righteousness like an ever-flowing stream." Was not Paul an extremist for the Christian gospel: "I bear in my body the marks of the Lord Jesus." Was not Martin Luther an extremist: "Here I stand; I cannot do otherwise, so help me God." And John Bunyan: "I will stay in jail to the end of my days before I make a butchery of my conscience." And Abraham Lincoln: "This nation cannot survive half slave and half free." And Thomas Jefferson: "We hold these truths to be self-evident, that all men are created equal..." So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for

the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime - the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth, and goodness, and thereby rose above his environment. Perhaps the South, the nation, and the world are in dire need of creative extremists.

I had hoped that the white moderate would see this need. Perhaps I was too optimistic; perhaps I expected too much. I suppose I should have realized that few members of the oppressor race can understand the deep groans and passionate yearnings of the oppressed race, and still fewer have the vision to see that injustice must be rooted out by strong, persistent, and determined action. I am thankful, however, that some of our white brothers in the South have grasped the meaning of this social revolution and committed themselves to it. They are still all too few in quantity, but they are big in quality. Some - such as Ralph McGill, Lillian Smith, Harry Golden, James McBride Dabbs, Ann Braden, and Sarah Patton Boyle - have written about our struggle in eloquent and prophetic terms. Others have marched with us down nameless streets of the South. They have languished in filthy, roach-infested jails, suffering the abuse and brutality of policemen who view them as "dirty nigger-lovers." Unlike so many of their moderate brothers and sisters, they have recognized the urgency of the moment and sensed the need for powerful "action" antidotes to combat the disease of segregation.

Let me take note of my other major disappointment. I have been so greatly disappointed with the White church and its leadership. Of course, there are some notable exceptions. I am not unmindful of the fact that each of you has taken some significant stands on this issue. I commend you, Reverend Stallings, for your Christian stand on this past Sunday, in welcoming Negroes to your worship service on a nonsegregated basis. I commend the Catholic leaders of this state for integrating Spring Hill College several years ago.

But despite these notable exceptions, I must honestly reiterate that I have been disappointed with the church. I do not say this as one of those negative critics who can always find something wrong with the church. I say this as a minister of the gospel, who loves the church; who was nurtured in its bosom; who has been sustained by its spiritual

blessings and who will remain true to it as long as the cord of life shall lengthen.

When I was suddenly catapulted into the leadership of the bus protest in Montgomery, Alabama, a few years ago, I felt we would be supported by the White church. I felt that the white ministers, priests, and rabbis of the South would be among our strongest allies. Instead, some have been outright opponents, refusing to understand the freedom movement and misrepresenting its leaders; all too many others have been more cautious than courageous and have remained silent behind the anesthetizing security of stained-glass windows.

In spite of my shattered dreams, I came to Birmingham with the hope that the white religious leadership of this community would see the justice of our cause and, with deep moral concern, would serve as the channel through which our just grievances could reach the power structure. I had hoped that each of you would understand. But again I have been disappointed.

I have heard numerous southern religious leaders admonish their worshipers to comply with a desegregation decision because it is the law, but I have longed to hear white ministers declare: "Follow this decree because integration is morally right and because the Negro is your brother." In the midst of blatant injustices inflicted upon the Negro, I have watched white churchmen stand on the sideline and mouth pious irrelevancies and sanctimonious trivialities. In the midst of a mighty struggle to rid our nation of racial and economic injustice, I have heard many ministers say: "Those are social issues, with which the gospel has no real concern." And I have watched many churches commit themselves to a completely other worldly religion which makes a strange, un-Biblical distinction between body and soul, between the sacred and the secular.

I have traveled the length and breadth of Alabama, Mississippi, and all the other southern states. On sweltering summer days and crisp autumn mornings I have looked at the South's beautiful churches with their lofty spires pointing heavenward. I have beheld the impressive outlines of her massive religious-education buildings. Over and over I have found myself asking: "What kind of people worship here? Who is their God? Where were their voices when the lips of Governor Barnett dripped with words of interposition and nullification? Where were they when Governor Wallace gave a clarion call for defiance and hatred? Where were their voices of support when bruised and weary

Negro men and women decided to rise from the dark dungeons of complacency to the bright hills of creative protest?"

Yes, these questions are still in my mind. In deep disappointment I have wept over the laxity of the church. But be assured that my tears have been tears of love. Yes, I love the church. How could I do otherwise? I am in the rather unique position of being the son, the grandson, and the great-grandson of preachers. Yes, I see the church as the body of Christ. But, oh! How we have blemished and scarred that body through social neglect and through fear of being nonconformists.

There was a time when the church was very powerful - in the time when the early Christians rejoiced at being deemed worthy to suffer for what they believed. In those days the church was not merely a thermometer that recorded the ideas and principles of popular opinion; it was a thermostat that transformed the mores of society. Whenever the early Christians entered a town, the people in power became disturbed and immediately sought to convict the Christians for being "disturbers of the peace" and "outside agitators." But the Christians pressed on, in the conviction that they were "a colony of heaven," called to obey God rather than man. Small in number, they were big in commitment. They were too God-intoxicated to be "astronomically intimidated." By their effort and example they brought an end to such ancient evils as infanticide and gladiatorial contests.

Things are different now. So often the contemporary church is a weak, ineffectual voice with an uncertain sound. So often it is an archdefender of the status quo. Far from being disturbed by the presence of the church, the power structure of the average community is consoled by the church's silent - and often even vocal - sanction of things as they are.

But the judgment of God is upon the church as never before. If today's church does not recapture the sacrificial spirit of the early church, it will lose its authenticity, forfeit the loyalty of millions, and be dismissed as an irrelevant social club with no meaning for the twentieth century. Every day I meet young people whose disappointment with the church has turned into outright disgust.

Perhaps I have once again been too optimistic. Is organized religion too inextricably bound to the status quo to save our nation and the world? Perhaps I must turn my faith to the inner spiritual church, the church within the church, as the true *ekklesia* and hope of the world. But again I am thankful to God that some noble souls from the ranks of organized religion have broken loose from the paralyzing

chains of conformity and joined us as active partners in the struggle for freedom. They have left their secure congregations and walked the streets of Albany, Georgia, with us. They have gone down the highways of the South on tortuous rides for freedom. Yes, they have gone to jail with us. Some have been dismissed from their churches, have lost the support of their bishops and fellow ministers. But they have acted in the faith that right defeated is stronger than evil triumphant. Their witness has been the spiritual salt that has preserved the true meaning of the gospel in these troubled times. They have carved a tunnel of hope through the dark mountain of disappointment.

I hope the church as a whole will meet the challenge of this decisive hour. But even if the church does not come to the aid of justice, I have no despair about the future. I have no fear about the outcome of our struggle in Birmingham, even if our motives are at present misunderstood. We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with America's destiny. Before the pilgrims landed at Plymouth, we were here. For more than two centuries, our forebears labored in this country without wages; they made cotton king; they built the homes of their masters while suffering gross injustice and shameful humiliation - and yet out of a bottomless vitality they continued to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.

Before closing I feel impelled to mention one other point in your statement that has troubled me profoundly. You warmly commend the Birmingham police force for keeping "order" and "preventing violence." I doubt that you would have so warmly commended the police force if you had seen its dogs sinking their teeth into unarmed, nonviolent Negroes. I doubt that you would so quickly commend the policemen if you were to observe their ugly and inhumane treatment of Negroes here in the city jail; if you were to watch them push and curse old Negro women and young Negro girls; if you were to see them slap and kick old Negro men and young boys; if you were to observe them, as they did on two occasions, refuse to give us food because we wanted to sing our grace together. I cannot join you in your praise of the Birmingham police department.

It is true that the police have exercised a degree of discipline in handling the demonstrators. In this sense they have conducted themselves rather "nonviolently" in public. But for what purpose? To preserve the evil system of segregation. Over the past few years I have consistently preached that nonviolence demands that the means we use must be as pure as the ends we seek. I have tried to make clear that it is wrong to use immoral means to attain moral ends. But now I must affirm that it is just as wrong, or perhaps even more so, to use moral means to preserve immoral ends. Perhaps Mr. Connor and his policemen have been rather nonviolent in public, as was Chief Pritchett in Albany, Georgia, but they have used the moral means of nonviolence to maintain the immoral end of racial injustice. As T. S. Eliot has said, "The last temptation is the greatest treason: To do the right deed for the wrong reason."

I wish you had commended the Negro sit-inners and demonstrators of Birmingham for their sublime courage, their willingness to suffer, and their amazing discipline in the midst of great provocation. One day the South will recognize its real heroes. They will be the James Merediths, with the noble sense of purpose that enables them to face jeering and hostile mobs, and with the agonizing loneliness that characterizes the life of the pioneer. They will be old, oppressed, battered Negro women, symbolized in a seventy-two-year-old woman in Montgomery, Alabama, who rose up with a sense of dignity and with her people decided not to ride segregated buses, and who responded with ungrammatical profundity to one who inquired about her weariness: "My feets is tired, but my soul is at rest." They will be the young high school and college students, the young ministers of the gospel and a host of their elders, courageously and nonviolently sitting in at lunch counters and willingly going to jail for conscience sake. One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judaeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.

Never before have I written so long a letter. I'm afraid it is much too long to take your precious time. I can assure you that it would have been much shorter if I had been writing from a comfortable desk, but

what else can one do when he is alone in a narrow jail cell, other than write long letters, think long thoughts, and pray long prayers?

If I have said anything in this letter that overstates the truth and indicates an unreasonable impatience, I beg you to forgive me. If I have said anything that understates the truth and indicates my having a patience that allows me to settle for anything less than brotherhood, I beg God to forgive me.

I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil rights leader but as a fellow clergyman and a Christian brother. Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear-drenched communities, and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty.

Yours for the cause of peace and brotherhood,

MARTIN LUTHER KING, JR.

Some rights more equal than others

■ *Both the civil rights and women's movements relied on civil disobedience and threats—the very tactics being denied pro-lifers under a racketeering law.*

Dennis
BYRNE

Thirteen years ago, 700 Chicagoans headed out to Washington, D.C., to protest the Reagan administration's policies on nuclear weapons, social programs and apartheid. They joined thousands of protesters from 39 other cities that included such groups as the National Organization for Women and Operation PUSH. But they weren't simply going to lobby and picket. Their avowed goal was civil disobedience; to make their point, they were going to break the law and trample on someone else's rights to run government or do business.

Giving his blessing was Chicago's mayor, Harold Washington, who issued a statement "wholeheartedly" endorsing and encouraging those activities.

A lot has changed in those 13 years. In an about-face, NOW is celebrating a jury decision on Monday that civil disobedience and protest by pro-lifers constitute "extortion" under the federal Racketeering Influenced and Corrupt Organizations law. Said a NOW attorney on Monday: "We cannot tolerate the use of threats and force by one group to impose its view on others."

I presume she was referring to, among other things, pro-life demonstrators who tried to blockade abortion clinics by chaining themselves together. Just as feminists chained themselves together years ago outside the door of the Illinois Senate to try to force passage of the Equal Rights Amendment. Or feminists who chained themselves to a Mormon church gate because they didn't agree with something the church did.

Or like the assorted civil disobediences engaged in by the Rev. Jesse Jackson, some of which got him arrested. Or the kind of "extortion" that his Operation Breadbasket engaged in years ago to "encourage" companies to hire more blacks. The way to break the white economic "colonialism" in the black community, he explained when he was starting the effort, was to "squeeze a company's vitals, which is its profit margin."

Such economic threats and civil disobedience were the coin of the civil rights and women's movements. When anti-war activists in 1984 caused $35,000 worth of damage to a nuclear weapons system in a Sperry war plant, liberals and idealists, such as myself, praised the courage and righteousness of these "citizens of conscience." In 1982, we sympathized with the 1,300 protesters who were arrested for blockading the entrance of a California nuclear laboratory.

The difference now between me and the hypocrites of the left is that I still believe in the necessity of moral protest and civil disobedience. Yes, you pay your price, as Martin Luther King Jr. did in a Birmingham jail. But not once, back then, did anyone, especially from the left, suggest that the full weight of a law passed to combat mobsters and organized murderers be dropped onto civil rights protesters, not just to shut them up, but to bankrupt them in such a way that they'll never be heard from again. To put such fear of destitution into the hearts of people of conscience, that they'll think twice about speaking their minds. In fact, it was liberals, such as Sen. Edward Kennedy (D-Mass.), who fought the enactment of RICO because he feared it would be used exactly this way, to stifle political and social protest—a purpose that the law's drafter, professor G. Robert Blakely, still says never was intended.

When the fight for the Equal Rights Amendment was in vogue, protesters chained themselves together outside the Illinois Senate—something abortion protesters cannot do.

But such repressive use of the law now becomes the legacy of NOW, and all the other civil rights "activists" who are content to sit quietly by while protest and civil disobedience are being stifled, because they are being exercised by pro-life groups.

The amazing thing is that the defendants, consisting of three pro-life groups and their leaders, including Joseph Scheidler's Pro-Life Action League, didn't even have to be found guilty of individual acts of "violence." They only had to be somehow "associated" with anyone who somehow committed or threatened violence or extortion. Meaning, I guess, guilt by association.

I'm not here, though, to argue the facts of the case, only the idiocy of the law and the hypocrisy of those who now would use it against only those they disagree with.

But that won't stop people of conscience. As long as existing law and judges sanctify the right of individuals to snuff out other human lives, for whatever reason they want, people of conscience will continue to fight. Monday's decision will only make them more determined, just as those who fought, in the face of unjust law, juries and judges, for the equality of mankind.

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BY JOHN LEO

Are protesters racketeers?

Congress wrote an intentionally vague and loosely worded law in 1970 as a tool to combat organized crime—the Racketeer Influenced and Corrupt Organizations Act. The American legal system being what it is, RICO was soon put to more imaginative uses. Its civil provisions—triple damages and the opportunity to smear somebody as a racketeer—made it a favorite among plaintiffs' lawyers. Soon tenants were suing "racketeer" landlords under RICO, and divorcing wives were suing their "racketeer" husbands. And a chorus of voices, left and right, warned that it was just a matter of time before someone managed to use RICO against political protesters.

That has now happened, but because the target group—antiabortion demonstrators—is very much out of favor with civil liberties groups and the chattering classes, the chorus has been mostly silent. One who did speak up, Harvard law professor Charles Ogletree, said this use of RICO "is unprecedented and raises serious questions about chilling important opportunities for political protest. This stretches the law beyond its logical limits."

The political stretching was accomplished by the National Organization for Women and two abortion clinics in a 12-year civil suit against antiabortion activists. Last week a U.S. district court jury in Chicago decided that two antiabortion groups and their leaders had engaged in a conspiracy to commit extortion and threats of violence against those operating or patronizing abortion clinics.

Lethal violence, such as arson and bombing, was not an issue in this suit. The antiabortion activists were accused of making threats, blocking clinic doorways, putting glue in door locks, occasionally grabbing and pushing and pulling the hair of doctors or patients, and "creating an atmosphere" that made more arson and bombing possible.

Easy cases. All lawbreaking deserves punishment, but RICO allowed these mostly low-level offenses to be lumped together and seen as a nationwide conspiracy to intimidate abortion doctors and patients. Congress specifically intended to make conspiracy easy to demonstrate in mob cases: Under RICO, two violations over a period of 10 years, even relatively trivial offenses, can be defined as a pattern of racketeering activity. But using this easy standard against political protesters should raise eyebrows. When combined with the severe threat of triple damages, it invites the use of the courts as arenas to punish political enemies.

One of the drafters of RICO, Notre Dame law professor G. Robert Blakey, warns that under RICO, a minor illegality—a bit of pushing and shoving or a rock thrown through a window—can transform an ordinary political demonstration into an attempt at "extortion."

The concepts of "extortion" and "obtaining property" used in RICO cases come from another law, the Hobbs Act, and those concepts are now astonishingly open to abuse. "Property" now means anything of value, such as the right of a store or clinic to solicit business or an individual's right of access to a clinic, so that even momentary interference, such as blocking a doorway, can be deprivation of property or extortion.

An antimobster law has now been used against abortion protesters. What group is next?

RICO could easily have been used to quell the antiwar protests in the 1960s, as the American Civil Liberties Union noted some years ago. But thanks to the ever broadening language of RICO decisions, it could also be used against many kinds of protests and simple sit-ins. If RICO had been available in the early '60s, segregationists would surely have used it to knock the legs out from under the civil rights movement. In the 1960 Woolworth lunch counter sit-in in Greensboro, N.C., the "property rights" of Woolworth to attract paying customers would have been seen as violated by conspirators who filled the counter seats for months. The group of black football players who stood protectively around the demonstrators would have been depicted as an illegal intimidating force.

In the antiabortion case, the judge's instructions to the jury stressed that property rights included the right of women to use the clinics and the right of clinic operators to provide services free of fear, including "fear of wrongful economic injury." Surely Woolworth customers and owners would have qualified for the same rights, and their "fear of wrongful economic injury" was beyond dispute. Woolworth lost $200,000 during the sit-ins, and it capitulated.

It takes little imagination to see how almost any protest group could be hammered by RICO, from Greenpeace and antinuclear protesters back to César Chávez's grape boycott (which certainly induced the growers' fear of wrongful economic injury). This has been clear for years. In 1970, the ACLU opposed RICO as being "one of the most potent, and potentially abusive, weapons for silencing dissent." Since then, the ACLU's voice has been more muted and ambivalent, mostly because its feminist allies argued hard that RICO was an ideal weapon to use in the abortion wars. The ACLU really ought to make an effort to recapture the principled position it staked out in 1970. Either you believe in First Amendment rights, or you don't. ■

And Liberty for Some

Switching Sides on Free Speech

By NEIL A. LEWIS

WASHINGTON

WHEN a Chicago jury ruled last week that a group of abortion opponents had violated a Federal anti-racketeering statute, officials of the National Organization for Women cheered: A law intended to bubble the mafia had been used successfully to punish aggressive protesters.

But officials at another group that, like NOW, supports the abortion rights movement were dismayed. The American Civil Liberties Union had argued that using the Racketeer Influenced and Corrupt Organizations Act, known as RICO, against abortion protestors set a dangerous precedent.

"We have always been afraid of using the racketeering law this way," said Nadine Strossen, the A.C.L.U.'s president and a professor at New York Law School. "This now could theoretically be used against any kind of protest movement."

And the penalties are harsh. The winner may collect triple the amount of actual damages from the loser.

Guessing Wrong

"The problem with RICO is that it's often hard to draw the line between acceptable protest and the kind of conspiracy which the law punishes," Ms. Strossen said. "The threat of having to pay such huge civil damages if you guess wrong as to the outer boundaries of free speech is far too harsh."

To many this is no mere intramural conflict. It is an element in a larger battle about free speech and the shape of American civil liberties doctrine at the end of the 20th century, a conflict in which liberals and conservatives, in many important ways, seem to have changed places.

Liberals, having used freedom of expression to achieve many of their goals over the last few decades, like legal equality for minorities, may no longer see the need for free speech as much as they once did. Universities, for example, where liberals have achieved hegemony, have been hotbeds of efforts to limit free expression with codes that prohibit racist comments or speech that could be construed as offensive to some group.

At the same time, it is the corporations and the wealthy who are arguing for unrestricted use of their assets to publicly press their agendas. Steve Forbes, for one, objects to any restrictions on spending his family publishing fortune to further his Presidential ambitions. Tobacco companies insist that Congress may not restrict their freedom to advertise without running afoul of the

Times have changed. Liberals find reasons to limit civil liberties. Corporations champion free expression.

First Amendment.

"I think what is happening now is part of the whole history turning," said Burt Neuborne, a law professor at New York University and a former legal director of the A.C.L.U. "The fact that we've been fairly successful in the last 10 or 20 years in insuring the effective protection of speech has led some people to think they can cast aside with the First Amendment without risking the overall structure," he said.

Moreover, the last period of intense censorship and suppression occurred more than 40 years ago when the nation was frightened by the threat of domestic Communism. "People believe that having freedom of expression is a natural phenomenon," Mr. Neuborne said. "It's not. It's the result of intense care and vigilance."

But Mr. Neuborne himself embodies both sides of the debate. He is wary of tinkering with freedom of expression yet he wrote a brief in the abortion clinic case in Chicago arguing that the use of the racketeering statute was acceptable.

"I believed the use of RICO was okay because it involved an effort to curb violence against the clinics," he said. "But I understand why the A.C.L.U. and others are nervous about it."

The difficulty, of course, is allowing the Government to decide which issues are so important, so urgent, that a measured curtailment of civil liberties may be accep

Continued on Page

New York Times April 24, 1998

A20 Saturday, June 6, 1998

The Washington Post

AN INDEPENDENT NEWSPAPER

Nat Hentoff

Antiabortion Racketeers?

Robyn Blumner—a former ACLU official and now a syndicated columnist at the St. Petersburg Times—is the most consistent civil libertarian I know and ardently pro-choice. When a federal jury in Chicago recently convicted antiabortion organizers of violating federal racketeering laws (RICO), Blumner wrote:

"I've been on the front lines of the abortion war. I know how ugly it gets when escorts have to crowd around a patient so she doesn't have to endure the pictures of mangled fetuses thrust in her face. . . . I have even had an elderly scarecrow of a man with 'God is Pro-Life' tattooed across his knuckles, wrapped around my legs reciting Scripture and trying to crawl past me. He didn't get past. He got arrested."

Blumner, however, is not celebrating the victory of the National Organization for Women, which brought the RICO suit in Chicago against the pro-lifers. "I am not willing," Blumner says, "to sacrifice the First Amendment to silence these abortion opponents."

RICO—Racketeer Influenced and Corrupt Organizations Act—became law in 1970 and was aimed at mobsters who use violence, intimidation and other forms of extortion to take over businesses and otherwise increase Mafia profits.

The law was drafted by G. Robert Blakey, now a Notre Dame law professor. He says the bill was never intended to apply to social or political movements, particularly after he tried to narrow its language following a strong concern by Sen. Ted Kennedy (D-Mass.). Kennedy feared that President Nixon might use RICO against anti-Vietnam war demonstrators—and activists in other social causes.

SWEET LAND OF LIBERTY

But now that a federal grand jury has extended RICO to pro-lifers, Sen. Kennedy—being vigorously pro-choice—is silent about the verdict in Chicago.

Through the years, RICO, it should be noted, increasingly took on expanded and vague meanings as the courts tried to interpret the statute, which was becoming more and more slippery. At one point, Supreme Court Justice Antonin Scalia complained about the "meager guidance" the court itself had been able to derive from the law.

Robyn Blumner notes that RICO is "so potently punitive, and with its loosely drawn definition of a criminal enterprise, too easily fits political advocacy organizations whose leaders and followers engage in occasional law violations in furtherance of a cause."

In the Chicago lawsuit, NOW claimed that the pro-lifers' illegal actions—such as blockading an abortion clinic—were forms of extortion through threats of violence, and some actual violence.

But as Prof. Blakey emphasizes in the National Law Journal, with the NOW victory opening the way for future RICO suits against diverse demonstrators, it will "unconstitutionally chill social protest—of all types, not just antiabortion demonstrations. The verdict establishes no bright line for distinguishing 'picketing' from 'pushing' or 'yelling' from 'threatening.'"

As the Chicago Sun-Times said in an editorial, peace and civil rights groups have sometimes used illegal tactics, but there are specific laws against those tactics, laws that should be enforced rather than having the Godzilla of punitive statutes imposed: RICO, with its triple damages and huge cumulative lawyers' fees during the long, expensive course of trial and appeals. (This NOW case started 12 years ago.)

As for illegal acts against abortion clinics and their workers, there is in place a 1994 statute that makes it a federal crime "to use force or physical obstruction to interfere with a woman seeking to obtain reproductive health"—it is called the Freedom of Access to Clinic Entrances Act (FACE). The penalties are stiff. With FACE on hand, there is no need for RICO terror tactics against any demonstrators.

As Robyn Blumner points out: "With this win, NOW and other pro-choice groups have the tool they need to bankrupt their most ardent and indefatigable antiabortion rivals. . . . And corporate forces have the tool they need to bankrupt the United Farmworkers Union."

One of the defense attorneys at the Chicago trial tells me that Judge David Coar, who is black, and was involved in the historic civil rights movement, said during a break in the trial that RICO, if it had existed then, could probably have been used against civil rights activists.

Consider the black students, sitting in at segregated southern lunch counters, preventing whites from using those facilities—and also preventing the white business owners from the use of their property. Those students were insisting on integration through, in RICO's term, "extortion."

Voices In The Wilderness
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United States Attorney General Janet Reno
Department of Justice
Constitution Avenue and Tenth Street NW
Washington, D.C. 20530

January 15, 1996

Dear Ms. Reno,

We the undersigned intend to deliberately violate the UN/US sanctions against the people of Iraq. We are teachers, social workers, parents, church workers, authors. Five years ago, we opposed the Persian Gulf War in a variety of non-violent ways. Some lived on the border between the opposing armies before and during part of the war; others traveled to Iraq immediately before and after the war. Still others filled the streets to denounce the war. Many of us have witnessed the consequences of sanctions first hand and maintained contact with NGOs that continually attempt to deliver relief supplies to neediest groups and individuals in Iraq.

In the five years since the Persian Gulf War, according to the United Nations Food and Agriculture Organization report, "as many as 576,000 children have died as a result of sanctions imposed against Iraq by the United Nations Security Council." If the blockade continues, UNICEF officers say that 1.5 more children will eventually suffer malnutrition or a variety of unchecked illnesses because the sanctions make antibiotics and other standard medicines impossible to get. We can no longer be party to this slaughter in the desert. We realize that we face a possible penalty of 12 years in prison and a $1 million dollar fine.

We invite you, in your capacity as guardian of justice in the United States, and in your concern for children who are the primary victims of the embargo, to join us in demanding

that the U.S. government lift this embargo which in its real effects is immoral and unjust.

During this fifth year since the Persian Gulf War, we are committed to solicit and transport medical supplies to the people of Iraq.

As we invite others to join us, we will inform them of the potential criminal charges for violating U.S. treasury dept. regulations. However, we will also encourage conscientious objection to these regulations which themselves violate international law and are an affront to respect for human life and basic human rights.

Thank you for your consideration. We look forward to hearing from you.

Sincerely,

Sue Ablab, Bremerton, WA
Anne Abowd, Toledo, OH
Thomas Abowd, Toledo, OH
Ed Agro, Boston, MA
Mr. Sabah Al-Mukhtar London, England
Jean Al-Salman, Portland, OR
Kathryn Anderson, Oak Park, IL
Felicity Arbuthnot, London, UK
Marya Barr, IHM, Ventura, CA
Bob Brister, Austin, TX
DeEtta Wald Beghtol, Milwaukie, OR
Madea Benjamin, San Francisco, CA
Daniel Berrigan, SJ, New York, NY
Philip Berrigan, Baltimore, MD
Randall B. Bond, Grand Rapids, MI
Fr.Bob Bossie, SCJ Chicago, IL
Paul Bossie, CLR Chicago, IL
Mike Bremer, Chicago, IL
Bob Brister, Austin, TX
Joan Brown, OSF, Sunland Park NM
Stanley Bunce, Grafton, NY
Kathy Shields Boylan Washington, D.C.
Dolores Brooks, OP Chicago, IL
Stanley Campbell, Rockford, IL
George Capaccio, Boston, MA
Michael Carrigan, Salem, OR
Casa Maria Catholic Worker Community, Milwaukee, WI
Ferdy Champagne, Garberville, CA

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

JAN 2 2 1996

WARNING LETTER

FAC No. C-149302

Dear Ms. Kelly:

The U.S. Treasury's Office of Foreign Assets Control ("OFAC") administers and enforces a comprehensive economic sanctions program and trade embargo against the Government of Iraq ("GOI") as promulgated in the Iraqi Sanctions Regulations, 31 C.F.R. Part 575 (the "Regulations"), under authority of the International Emergency Economic Powers Act, 50 U.S.C. 1701 et seq. ("IEEPA"), and the United Nations Participation Act, 22 U.S.C. 287c. The Regulations prohibit U.S. persons from engaging in virtually all direct or indirect commercial, financial or trade transactions with Iraq, unless authorized by OFAC.

This Office has learned that you and other members of Voices in the Wilderness recently announced your intention to collect medical relief supplies for the people or Iraq at various locations in the United States and to personally transport the supplies to Iraq.

Section 575.205 of the Regulations prohibits the exportation or reexportation of goods, technology, or services to Iraq, except as specifically provided in the Regulations. Pursuant to section 575.521 of the Regulations, specific licenses may be issued by OFAC on a case-by-case basis to authorize the exportation to Iraq of donated medical supplies intended strictly for medical purposes in accordance with United Nations Security Council Resolutions 661 and 666 and other applicable Security Council resolutions. OFAC has issued many licenses authorizing exportation to Iraq of food, medicine, medical supplies and other humanitarian aid items.

Section 575.207 prohibits U.S. persons from engaging in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq or to activities within Iraq, with the following exceptions:

- those transactions necessary to effect the departure of a U.S. citizen or permanent resident alien from Iraq;
- transactions relating to travel and activities for the conduct of official business of the U.S. Government or the United Nations and
- transactions relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization.

All other travel related transactions to and within Iraq by U.S. persons, to include the payment of one's own travel or living expenses to or within Iraq, are prohibited unless specifically licensed by OFAC.

OFAC has no record that your organization has requested a specific license to export medical supplies to Iraq and to travel to Iraq to supervise the delivery of such supplies.

Accordingly, you and members or Voices in the Wilderness are hereby warned to refrain from engaging in any unauthorized transactions related to the exportation of medical supplies and travel to Iraq. Criminal penalties for violating the Regulations range up to 12 years in prison and $1 million in fines. Civil penalties of up to $250,000 per violation may be imposed administratively by OFAC.

Should you wish to apply for a specific license, you may do so in writing at the following address:

U.S. Department of the Treasury
Office of Foreign Assets Control
Attn: Licensing Division
1500 Pennsylvania Avenue, N.W. (Annex)
Washington, D.C. 20220

If you have any questions concerning this letter, you may call me at (202) 622-2430.

Sincerely,

David H. Harmon
Acting Supervisor, Enforcement Division
Office of Foreign Assets Control

Voices in the Wilderness
Attn: Kathleen Kelly
1460 West Carmen Avenue
Chicago, Illinois 60640

cc: Mark J. Vogel
Assistant United States Attorney
Northern District of Illinois

Joseph J. Tafe
United States Department of Justice
Washington, D.C.

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U.S. Department of Treasury
Office of Foreign Assets Control
Attn: David H. Harmon, Acting Supervisor,
Enforcement Division
1500 Pennsylvania Avenue, N.W. (Annex)
Washington, D.C. 20220

February 1996

Dear Mr. Harmon,

We received by fax your letter of January 22, 1996 which warns us to refrain from engaging in any unauthorized transactions related to the exportation of medical supplies and travel to Iraq.

Literature for this campaign already includes mention of the penalties that could be imposed for aiding people of Iraq. We thank you for the clarity of the warning.

We also want you to know that we will continue our effort to feed and care for the children and families of Iraq. We will do so by collecting medical relief supplies and then, openly and publicly, transporting these supplies into Iraq for delivery to people in need. We are governed not by rules that license people to bring aid to people in need, but rather by compassion. We invite you to join us in our effort to lift the current sanctions against Iraq and end the cruel suffering endured by innocent people.

Signers:

Bob Bossie,SCJ, Br. Paul Bossie,CLR, Dolores Brooks,OP, Kathleen Desautels,Sp, Jim Douglass, Kathy Kelly, Karl Meyer, Anne Montgomery,RSCJ, Eileen Storey,SP, Chuck Quilty, Gene Stoltzfus, Dorothy Friesen, Sam Day, Deve Dellinger, Elizabeth Petereon and over 80 others.

To Feel What Ima Feels

by Kathy Kelly May 24, 1998

Earlier this month, several members of the Iraq Sanctions Challenge stood at the bedside of Mustafa, one of at least a dozen dying children in a crowded, wretched ward of the main hospital in Basra, Iraq's southern port city. His mother, tall, thin and quite beautiful, sat cross legged on the mattress beside him, waving away flies, as the doctor explained to us that the child, hospitalized for the past twenty days, now suffered from dehydration, diarrhea, acute renal failure and extensive brain atrophy. Lacking equipment and medicine to diagnose and treat Mustafa, the doctors could only stand by, helpless and frustrated, while the child's condition worsened over three weeks time If Mustafa survives, he will be severely crippled

Ima Nouri, his mother, is 35 years old. Her serious eyes, large and luminous, followed us as we paused before each bedside. She seemed surprised when we asked her to tell us a little about herself. We learned that she lives in a rural area north of Basrah and has two children at home whom she misses very much. We asked the doctor to tell her that we are so very sorry, that we want to tell people in the US her story, that we will try hard to end the sanctions. She smiled slowly, nodded. Then we mentioned that people in the United States were celebrating Mother's Day on this day and asked if she had a message for mothers in our country. Ima suddenly became animated. "Yes," she said, "I have two messages. First, tell them, from Iraqi women, that these are our children and we love them so much." Stroking Mustafa's face, she continued, "Ask them to please try to help us protect them and take care of them. And, for American women, -- I want them to feel what I am feeling "

Her message to us could not be more clear. If people in the US could feel her anguish, humiliation, horror and despair -if they could feel the loss experienced by Iraqi mothers when their children are sacrificed to US policy, -then perhaps we would find the energy and passion to end the sanctions. If people here could feel Ima's frustration and fear, they would realize that Iraq's children are innocent victims caught between two opposing forces; the main issue is not whether Iraq's government is criminal, nor even whether the US has acted criminally, - the main issue is that only dialogue and conciliation can save the lives of these children, and such discussion is urgently needed

When the possibility of discussion and dialogue is raised, some will say that only economic sanctions or military force will make Iraq comply with UN agreements (in other words, either starve the civilians or bomb them) We believe there is no human benefit in backing any government into a corner and causing greater desperation, as the economic sanctions have already done in Iraq UN Secretary General Kofi Annan's February, 1998 visit to Baghdad showed that conciliation and negotiation prompted increased cooperation and continued dialogue Iraq's children bear the brunt of UN/US economic warfare - a war that employs a hideous weapon of mass destruction economic sanctions. Ima Nouri wants us to protect these children, to feel what she feels Truthfully, we can only begin to feel the pain Iraqi mothers endure. May their pleas strengthen our resolve to protect the children who are caught, right now, malnourished, sick, disabled and dying - they are not bargaining chips, they are children And they have a right to live


WHAT Women WANT
DEFENDANT'S EXHIBIT
B20
PATRICIA IRELAND
PRESIDENT OF THE NATIONAL ORGANIZATION FOR WOMEN

In the tradition of the suffragists, I was arrested outside the Bush White House as NOW began a campaign of nonviolent civil disobedience in support of abortion rights during the 1992 elections. (*Reuters*)

that fewer and fewer people were willing to take part in blockades. Spending a night in jail with their friends might have some appeal to an antiabortionist with fantasies of easy "martyrdom." But when we went after their bank accounts, cars, and other material assets, the adventure quickly lost its romantic appeal. OR participant Adele Nathanson paid $25,000 in settlement of a $50,000 judgment against her for violating a court order we'd won banning clinic assaults in New York City, and we made sure that word was spread among the OR ranks.

The numbers confirmed the decrease in blockades and blockaders. Clinics belonging to the National Abortion Federation had reported 182 clinic blockades with 11,732 resulting arrests in 1988, and 201 clinic blockades with 12,358 arrests in 1989. By 1990, those numbers had dropped to 34 clinic blockades and 1,363 arrests.

In April 1990 Randall Terry announced that he was stepping aside from the day-to-day operations of Operation Rescue in order to focus his attention against "Godless, pro-abort judges who serve as lapdogs and lackeys to the National Organization of [sic] Women." He couldn't have played into our strategy more perfectly, I thought. If the U.S. attorney general started getting calls from federal judges who were being personally targeted, the federal government might finally be forced to take some action. Also, judges insist on their orders being taken seriously, and by this time several of them had been faced with Operation Rescue's continual contempt. And, as much as they may strive for impartiality, judges read the papers, too.

I felt as if we were making progress.

During my time as executive vice president I came to understand more clearly the unique perspective I could bring to the presidency: the perspective of someone who had functioned—and functioned well—in the world outside the women's rights movement. The negotiating skills I'd learned as a business lawyer and my experience of "women's work" as a

ore than 140 abortion-rights supporters were arrested yesterday as they tried to block the Manhattan entrance to the Holland Tunnel monstration of political outrage. A protester shouted from a police bus after being taken into custody near the tunnel.

bortion-Rights Supporters Try to Close Down the Holland Tunn

By CATHERINE S. MANEGOLD
Special to The New York Times

NEW YORK, July 2 — In a well-orchestrated expression of political rage that briefly snarled downtown traffic, several hundred abortion-rights supporters attempted to close down the Holland Tunnel this afternoon while shouting slogans supporting abortion rights without legal constraints.

The move to close the tunnel was countered by New York City and Port Authority police officers who generally managed to keep traffic moving as they arrested more than 140 protesters at the tunnel entrances along Varick Street.

The authorities had prepared for the well-publicized protest by obtaining a court injunction against those trying to choke access to the tunnel and by suspending parking on many downtown streets to keep the traffic moving along narrow access routes.

Traffic was tied up in the area for about 45 minutes and was cleared by 5 P.M., said a police spokesman, Officer Scott Bloch.

Varick Entrances Closed

The demonstration, which was preceded by civil disobedience training for participants and was widely publicized among groups sympathetic to abortion rights, was backed by a vaguely defined coalition of "pro-choice, AIDS and lesbian and gay activists," according to one leaflet.

Scores of officers were already deployed near the tunnel entrances just after 3 P.M. when two dozen protesters emerged from a building near the tunnel entrance and, chained together, pushed into a wall of officers guarding access to the tunnel. As they pushed against the officers, several other groups without chains arrived and sat down in the middle of Varick Street, blocking traffic.

Both Varick Street entrances were closed off during much of the early afternoon as demonstrators lay in groups across the street or sat with arms linked, resisting police officers' attempts to move them into nearby buses and vans.

"I respect people's willingness to put their bodies on the line," said Simon Watson, a 37-year-old from Rochester who found himself in a brief tie-up on Watts Avenue while on his way to Pennsylvania. "It's a right of citizens to demonstrate. But I am glad I'm sitting in the shade."

Sympathetic Observers

George Milaud, a printer from Sayreville, N.J., whose car was being repaired at a shop near the tunnel entrance, said he was resisting a temptation to join the group. "My personal belief is that women should be able to do whatever they want with their bodies," he said. "Forget it. No one should be able to dictate to them."

He said he was unconcerned about the traffic, "because it's not that bad and here I am right near the entrance."

Sandy Hirschkowitz, a 27-year-old sculptor who said she had gone to the tunnel entrance to support the demonstrators, said she at first objected to the tactics being used. Once at the demonstration, however, she said she decided "there wasn't much else they could do."

A friend nearby, Sarah Barnum, a 30-year-old painter, said she particularly objected to the Pennsylvania law requiring teen-agers to get parental consent before having an abortion.

"The 10 percent of kids who don't tal[k to] their parents have a reason not [to tell] their parents," she said. She sa[id she] had gone to the demonstration to [show] her support, but did not want [to be] arrested.

Most of the several hundred who gathered near the police va[ns and] watched as the protesters [were] dragged off said they essential[ly sup]ported their cause. But some we[re less] than charitable about their tac[tics].

"I live in Woodbridge, N.J. [I] want to go home," said a const[ruction] worker who stood watching the [scene] with several family members. [This] place is no good for this sort [of thing.] I've been wanting to get home [since ...] o'clock."

draws media attention. It can help your public image and publicize the fact that you are a force in the community.

A convention takes planning, a good staff, a coordinator, a convention chairman, and lots of money. You may have to contact your more wealthy members for money to get the convention off the ground.

Do not be disappointed if your first convention is smaller and less impressive than you had expected. People will profit from it. Few things you do in the pro-life movement are useless. It is better to go ahead with your plans even if you suspect that it will not be as spectacular as you hope. Your first convention rarely will be, and it will also be your hardest. You will make lots of mistakes. Learn from those mistakes, and your second convention will be easier.

Do not overextend yourself by bringing in too many special guests on your first attempt. That will only burden your committee with extra expenses. Try to get speakers to donate their services. Provide them with transportation, room, and board. If you cannot afford hotel rooms, ask some of your members to accommodate them in their homes. Most speakers are happy to stay in someone's home and many even prefer this arrangement to a motel room. But always be sure to ask the guests their preference.

Avoid unnecessary expenses for your first convention. Use simple decorations, free entertainment, a low budget meal. Do not go in debt. It is hard to get members enthusiastic about paying off debts.

It is also important to do something that will become a tradition at your convention, such as giving a special award. Create an atmosphere that identifies your organization. Develop a spirit that draws conventioneers into your organization. Make them feel that they are an important part of a great movement—a spirit your speakers can help establish.

The convention can help hold the pro-life movement together in your community. People usually become enthusiastic during a convention and are encouraged to go out and continue their fight for the unborn. The compliment we hear most often at conventions we attend is that the planning committee has not directed sufficient attention to the role of activism in the pro-life movement. We held an activist convention in 1984 and invited activists from all across the country. Even that was not as active as we would have liked, but it got the ball rolling, and the next year we got what we had wanted, a 100 percent activist convention. We were in our glory.

81 VIOLENCE: WHY IT WILL NOT WORK

By violence here we mean a direct, physical attack on some type of facility or the personnel who work there.

There is a small faction within the pro-life movement—just as there is within any movement—who, from time to time, talk about the advisability of stopping abortion by force. We have even heard some who discuss the possibility of the abortion conflict escalating into a "shooting war."

Most of this is just talk. The fact remains, however, that there have been incidents of violence against both pro-life facilities and abortion clinics and offices. Generally, this violence has taken the form of damage to property, although there was also a kidnapping of an abortionist and his wife, and in 1993, the shooting death of an itinerant abortionist in Pensacola, Florida, Dr. David Gunn.

This author has been struck, spit on, pushed, and received innumerable death threats, warnings, insults, and crank calls, he has had his sight damaged, tires slashed, office windows cut with glass-cutters and broken with rocks, his office painted with roofing tar and his home vandalized. Nearly all pro-life activist leaders can cite a similar list of malicious acts. Some pro-life offices have been fire-bombed. Pro-life pickets and counselors have had buckets of water thrown on them, have had cars driven toward them at high speeds, have been struck by these cars and with clubs by clinic guards. We have almost all been subject to a variety of insults and injuries. Few of these incidents ever get reported, since many police departments are reluctant to acknowledge that they happened. There have been very few arrests of abortionists made, and even fewer guilty verdicts handed down.

On the other hand, there are a growing number of highly publicized instances of what appear to be pro-life violence against abortionists and their clinics. The kidnapping of abortionist Hector Zevallos in August, 1982 by the so-called "Army of God" was an isolated and unusual incident, allegedly the responsibility of a few zealous anti-abortionists acting independently of any larger group. Zevallos and his wife were released unharmed after eight days, and one of the men

implicated in the "conspiracy and attempt to interfere with interstate commerce" was sentenced to thirty years in jail, with twelve more years added to the sentence later.

Another anti-abortionist, admittedly acting alone, was jostled after he entered a New York abortion clinic, spilled gasoline on the property, and set the clinic ablaze. The only one who suffered injury was the anti-abortionist. The building housing the clinic was damaged. In 1984 there was a rash of attacks on abortion clinics, mostly on the East Coast, in Texas, and in Washington state. In these and other cases, the aim seems to have been to curtail abortion by putting the facility out of commission, at least temporarily.

It should be pointed out that the abortionists, in presenting what they believe to be cases of pro-life violence, often lack evidence that the attack was made by pro-life people. And they lump together all kinds of "terrorist tactics" such as telephone calls, pickets, and peaceful sit-ins, in an effort to present a sinister picture of what is in fact *non*-violent pro-life activism.

All of the activist pro-lifers the Pro-Life Action League works with concur with the League's position against violence and its program of *non-violent direct action*. We take our commitment to non-violence seriously, believing that violence on our part would be counter-productive. It is the abortionists who are engaged in routine violence against unborn children (dismemberment, salt poisoning, strangulation) and their mothers (hemorrhage, scarring, infection, sterility). The use of violence could damage the reputation of pro-life activists, while undermining traditional non-violent methods. The use of violence might reinforce the erroneous belief that the end justifies the means, and that evil can be overcome by evil.

Besides, the use of violence probably would not work in the long run. The destruction of an abortion clinic is a temporary solution. New quarters can be found. Putting an abortionist out of commission for a while, as in the 1982 Zevallos kidnapping, did not stop abortions. While we might respect the zeal that would prompt such activities, we do not condone or recommend them.

We have corresponded with Peter Burkin who was implicated in an abortion clinic firebombing in New York. Several of us have visited Don Benny Anderson, who has been sentenced to a federal penitentiary in connection with the 1982 Zevallos kidnapping. We are also in touch with Joseph Grace, implicated in a case of damage to an abortion clinic in Norfolk, Virginia and have visited with Curtis

Beseda, implicated in a clinic fire in Everett, Washington. All four men are dedicated to the belief that unborn children's most basic right—the right to life—is being violated by abortion and that daring actions are needed to awaken Americans to the terrible reality of abortion. But most pro-lifers would say that all four, if guilty, went too far.

What lasting advantage is there to show for the actions they were accused of? Zevallos went back to Hope Clinic to do more abortions; the damaged clinics have reopened or have sent their clients elsewhere. Was the effect these actions had on the image of a movement that condemns violence helpful? While we understand the feelings of anger, outrage, and frustration that likely prompted these and similar actions, we advise pro-lifers not to resort to violent tactics, but to save lives and stop abortions through non-violent, direct action.

Direct action, and even civil disobedience, have an important part to play in winning the pro-life battle. But violence, we believe, does not.

We must point out for the sake of proper perspective, however, that no amount of damage to real estate can equal the violence of taking a single human life. Civilized societies rate the loss of life as far more serious than property damage. But today, in our society, punishment is meted out to those who damage property—while those who destroy life are rewarded. It is a sign of the deterioration of our values that much of the national media concentrates on damaged buildings, with pictures of charred real estate, while refusing to present pictures of the human victims who are heartlessly and systematically dismembered and painfully killed inside that real estate.

Pro-lifers are rarely allowed to show on network television the victims of abortion—the real violence of the abortion debate. Yet we have had to watch nauseam pictures of damaged buildings carefully panned on America's TV screens, while being directly or indirectly accused of causing the damage.

But we will not play the abortionists' violent game. We plan to win without resorting to violence.

The shooting death of Dr. Gunn, while allegedly committed by a man new to the movement, only served to bring on a rash of restrictive bills, speed up legislation aimed at curtailing totally non-violent pro-life activity, and give the pro-abortionists a "martyr." It made it momentarily more difficult to convince the man-on-the-street that pro-lifers had an undisputed claim to the high moral ground.

PRO-LIFE ACTION LEAGUE

Joseph M. Scheidler, Executive Director

December 30, 1994
IMMEDIATE RELEASE

Contact: Joseph M. Scheidler
312-777-2900/774-1030

Pro-Life Action League Denounces Shootings

"Vigilantism is totally contrary to the principles of the pro-life movement," said Joseph M. Scheidler, Executive Director of the Pro-Life Action League, in response to the news that there have been shootings at two abortion clinics in Brookline, MA. "There is no moral justification for this action."

Mr. Scheidler's book, *CLOSED: 99 Ways to Stop Abortion*, includes a chapter entitled, "Violence, why it won't work." The Pro-Life Action League has been a pioneer in promoting the conversion of abortionists to the pro-life view. The League has consistently protested the violence within the clinics against the unborn, as well as the violence directed at the clinics and clinic personnel.

The Pro-Life Action League has hosted four conferences, featuring fifteen former abortionists, all of whom are now actively involved in the pro-life movement. "I am convinced that it is the people who know the abortion industry from the inside who are going to ultimately turn this country around," said Scheidler.

"All of the former abortionists who have testified at our Providers Conferences have told us that it was the compassion and sincerity of a pro-life person that provided the strength for them to get out of the abortion industry," said Scheidler. "We counsel all pro-life activists to aim to be that person."

"Acts of violence against abortionists have only resulted in more laws restricting legitimate pro-life activism, such as the Freedom of Access to Clinic Entrances (F.A.C.E.) act and the 'bubble zones' around certain clinics," said Scheidler. "It becomes increasingly difficult for us to offer alternatives to women seeking abortions."

"We are committed to non-violent witness to the value of life," said Scheidler. "We call upon anyone who claims to hold life sacred to join us in sidewalk counselling, protesting the taking of innocent life and welcoming the abortionists to enlist in our ranks."

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...tion stance: "Pro Death President," "Abortion President," and others.

Clinton was expected at 6:00, but he was hours late. By 8:00, disgruntled attendees of the fundraiser were observed leaving the Hilton, but most of the pro-lifers waited. Shortly after, the barricades were erected near a little-used service driveway on Wabash Avenue.

Most of the pro-lifers who assembled there were driven back by police behind the north side of the

They were only a few feet away from the motorcade as it turned onto Balbo. Ruggiero saw the lead motorcycle cop give them the thumbs up sign.

But as the president's vehicle passed, Murphy observed a man inside whose head was turned away, making an obscene gesture. The motorcade turned north on Wabash where, speeding into the driveway entrance, it encountered the main body of protesters.

WHY ANTI-ABORTION VIOLENCE IS WRONG

by Ann Scheidler,
with excerpts from "On the Question of Using Lethal Force to Defend the Unborn" by Brian Gibson and James Vitittow.

Christian people have struggled for centuries with the issue of if and when killing a human being is justified. Christian society moved from a position of absolute refusal to even defend oneself from fatal attack to the writings of Thomas Aquinas in the Summa Theologica in the fourteenth century, which remain the standard for Western law with regard to the use of force.

The first criteria for the use of force is **The force used to prohibit harm to an individual must be the least amount of force reasonably necessary to protect** oneself or another. Shooting an abortionist is not the least amount of force necessary to prevent the killing of unborn children. A whole array of tactics could prevent an abortionist from getting to the business of killing children.

Stopping an act of aggression in defense of oneself or another must be with the moral certitude that harm will be inflicted upon that individual if force is not used. Since we cannot know for certain what is in the heart and mind of the abortionist on any given day as he goes into the abattuary, we cannot prove that harm will be done to an individual. Each of the abortionists who have testified at the Pro-Life Action League's "Meet the Abortion Providers" conferences, walked into his or her abortion clinic one day for the last time — to clear out his desk and quit.

The person preventing the harm to an individual cannot intend to inflict mortal injury on the aggressor. Since the Christian has a scriptural mandate to love his enemies, when intervening for the life of oneself or another, the Christian cannot intend to kill even if that is the result.

All three of these conditions must be taken together as the criteria for justifying the use of lethal force. The Christian understanding on the use of force has also been predicated on the fact that the initial act of aggression is illegal according to lawful authority. This poses a problem where the abortion issue is concerned. **The legal authority of our** day has allowed for the killing of innocent, defenseless human beings, the most serious inequity in many generations. We therefore have the obligation to seek remedies to this grievous injustice. But we may not fight evil with evil or inflict mortal injury to attain our goals.

We in the pro-life movement are called upon to be loving examples of the peaceful, non-violent resolution of injustice. We are not the ultimate judges of the actions of the abortionists. Our job is to attempt to educate them on the value of life and the grave evil of their actions, to pray for them and provide them the opportunities and incentive to quit the abortion business. We must leave to God the awesome responsibility of judge.

In the wake of the recent [illegible] **Pro-Life Action League** has gone on public record as opposing [illegible] **non-violent direct action to combat** [illegible] **quoted extensively in national public** [illegible] **morally unacceptable and counterproductive to the pro-life movement.**

The Pro-Life Action League has focused on the task of converting abortionists. We recommend sending our video, "Meet the Abortion Providers," to each abortionist. Try to establish some kind of a relationship with the local abortionist, to talk to him about why he is involved in abortion. Some may mistakenly believe they are providing a service for women.

Another significant factor to keep in mind is that the abortionist is not the prime threat to the baby's life. He is the hired killer. The mother is the more imminent aggressor, and she is frequently under pressure from a boyfriend, a husband or a parent. She is still free to go to another abortionist if the first one is unavailable.

We come back to the fact that **conversion** is the only real solution to the assault on unborn life. **The abortionists need conversion. The** expectant parents need conversion. Society in general needs to wake up to the pervasive evil of abortion. As frustrating as it may be, we will triumph only if we play by God's rules.

Mr. MCCOLLUM. Mr. Kerr.

STATEMENT OF JEFF KERR, ESQ., GENERAL COUNSEL, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS

Mr. KERR. My name is Jeff Kerr, and I am general counsel to PETA. I am happy for the opportunity to speak to you today.

On behalf of our 600,000 members, we urge you to stop the misuse of civil RICO actions against peaceful social advocacy groups. The RICO Act, in our view, is being perverted from a tool designed to fight organized crime into a sword poised at the throat of public debate on important social issues. Ironically, RICO itself is being manipulated in an effort to extort silence from advocacy groups who investigate and uncover wrongdoing.

When targeted with a RICO action, these groups are faced with a painful dilemma. Do they carry out their public duty by exposing the wrongdoing and thereby risk financial ruin from RICO's burdensome damage provisions? Or do they surrender to the threat of financial ruin and the possibility of being labeled a racketeer by suppressing their information in dereliction of their organizational responsibility? The potential chilling affect of the discovery and dissemination of information vital to the public interest is clear.

Let me assure you that I am not overstating the case. Just last year PETA was the target of a major civil RICO lawsuit brought by Huntingdon Life Sciences, a New Jersey based vivisection laboratory. I am limited in what I can say about the case because of the terms of a settlement agreement, but I can comment on information contained in certain press accounts.

The RICO suit leveled against PETA resulted from PETA's 8-month undercover investigation of Huntingdon's laboratory. Our investigation revealed evidence of cruelty to animals in tests conducted for leading makers of household products and pharmaceuticals. Workers routinely slammed monkeys into cages, suspended monkeys in midair while pumping test substances into their stomachs, and screamed and shook their fists in frightened monkeys' faces when they were strapped down for electrocardiograms. One technician even stuffed a lotion bottle in a monkey's mouth as a joke.

Upon completion of the investigation, PETA filed a 36-page complaint about the U.S. Department of Agriculture and went public. We gave the USDA our investigator's videotape of the conditions and procedures at the lab. Because of the settlement, I can't show you that videotape or those photographs. Fortunately, they were widely disseminated before the lawsuit was filed. The conditions were deplorable, and the animals suffered greatly. One Huntingdon supervisor's internal memo tells technicians to look at the injuries they caused the animals and said, "Just think how you would feel to be put into a cage and physically abused."

One of the lab's customers to whom we submitted our investigation results immediately suspended all testing with Huntingdon and conducted its own investigation, saying the attitudes and behavior shown by the lab technicians are unacceptable to us.

At approximately the same time as PETA's investigation, a British television station was conducting its own undercover investigation of Huntingdon's British parent company. Huntingdon's British

employees were filmed punching a beagle dog in the face and simulating a sex act during test procedures. Members of Parliament and British citizens were outraged. Not only did the company not sue the television station in the U.K., it fired two employees who pleaded guilty to charges of animal cruelty. It then scrambled to keep its business license by complying with 16 stringent requirements under home office scrutiny.

I raise this because we find it ironic and distressing that a nearly identical investigation of animal cruelty against the American subsidiary was met with an onerous RICO suit rather than immediate and sweeping corrective action.

The RICO counts in our case allege that PETA's earlier animal cruelty investigations dating back as far as 1989 constituted a pattern of racketeering activity, including extortion through a climate of violence against Huntingdon and the other subjects of our investigation. All told, Huntingdon sought damages and legal fees exceeding $10 million. Early in the case we were slapped with a gag order which precluded us from further disseminating our findings to the public. The gag order prohibited us from cooperating with the USDA investigation of our own complaint, and this despite USDA requests for our cooperation.

We chose to fight at every turn during 6 months of intense litigation. Ultimately, we were vindicated when, as a result of our complaint and its own subsequent investigation, the USDA charged Huntingdon with 23 counts of violating the Animal Welfare Act.

Even though we fought hard and obtained a satisfactory result in the end, the realities of civil RICO actions against peaceful social advocacy became all too apparent.

First, opponents of advocacy groups are permitted to make sweeping allegations of criminal conduct "upon information and belief," the phrase that any litigator is very well-versed with, with no evidence to support the charges.

Second, the broad allegations may permit the plaintiffs to engage in a discovery fishing expedition into virtually every aspect of every prior campaign by the advocacy group.

Third, the cost to properly defend against such charges and discovery and the risks inherent in any litigation create profound impediments to aggressive advocacy work which is so vital to social activism.

Thus, the civil RICO plaintiffs are able to extort violence or terminate aggressive activism and research into allegations of misconduct.

Let me assure you that PETA is an advocacy organization, not a racketeer. Regardless of what anybody may think of our philosophy, created sometimes through our theatrical means of communicating our message, PETA and other social change organizations are not racketeers against whom RICO was intended to be used. PETA was founded on and adheres to the ideals of peaceful direct actions. When PETA hears of allegations of abuse, we thoroughly investigate them and report our findings to proper authorities, and we expose the abusers by publicizing our findings through our magazine Animal Times and other outlets. These are actions are consistent with those and so many other social advocacy groups

throughout our history and bear absolutely no resemblance to the violent world of organized crime against which RICO was directed.

I am about out of time. Let me wrap up and say, in conclusion, that this subcommittee has a unique opportunity to revise the RICO Act in a way that will reinvigorate social debate and stop civil RICO actions from being used as a club to extort silence from social advocacy organizations, and PETA will gladly work with the subcommittee to craft legislation to achieve that purpose.

Thank you.

Mr. MCCOLLUM. Thank you, Mr. Kerr.

[The prepared statement of Mr. Kerr follows:]

PREPARED STATEMENT OF JEFF KERR, ESQ., GENERAL COUNSEL, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS

Mr. Chairman and members of the Subcommittee:

INTRODUCTION

My name is Jeff Kerr. I am General Counsel to PETA, People for the Ethical Treatment of Animals. Thank you for the opportunity to address you today.

On behalf of our 600,000 members, we urge you to stop the misuse of civil RICO actions against peaceful social advocacy groups. The RICO Act is being perverted from a tool designed to fight organized crime into a sword poised at the throat of public debate on important social issues. Ironically, RICO itself is being manipulated in an effort to extort silence from advocacy groups who investigate and uncover wrongdoing. When targeted with such an action, these groups are faced with a painful dilemma. Do they carry out their public duty by exposing the wrongdoing and thereby risk financial ruin from RICO's burdensome damage provisions; or do they surrender to the threat of financial ruin and the possibility of being labeled a racketeer by suppressing their information in dereliction of their organizational responsibility? The potential chilling effect on the discovery and dissemination of information vital to the public interest is clear.

Let me assure you that we do not overstate our case. Just last year PETA was the target of a major civil RICO lawsuit brought by Huntingdon Life Sciences, a New Jersey-based vivisection laboratory. I am limited in what I can say about the case because of the terms of a settlement agreement, but I can comment on information contained in certain press accounts. That information demonstrates the real threat to free expression and public accountability posed by civil RICO actions against peaceful advocacy groups.

THE CIVIL RICO ACTION AGAINST PETA

The RICO suit levelled against PETA resulted from PETA's eight-month undercover investigation of the Huntingdon Life Sciences contract research laboratory. Our investigation revealed evidence of sickening cruelty to animals in tests conducted for leading makers of household products and pharmaceuticals. Workers routinely slammed monkeys into cages, suspended monkeys in mid-air while pumping test substances into their stomachs, and screamed and shook their fists in frightened monkeys' faces when they were strapped down for electrocardiograms. One technician stuffed a lotion bottle into a monkey's mouth as a "joke."

Upon completion of the investigation, PETA filed a 36-page complaint with the U.S. Department of Agriculture and went public. We gave the USDA our investigator's videotape of the conditions and procedures at the lab. Because of the settlement, I cannot show you that videotape. Fortunately, it was widely disseminated before the lawsuit ensued. We turned over photographs of lab conditions. I cannot show you those photographs, but they too were distributed before the lawsuit was filed. But I can tell you that conditions were deplorable and the animals suffered greatly. One Huntingdon supervisor's internal memo, dated January 30, 1997, tells technicians to look at the injuries they caused the animals and adds: "Just think how YOU would feel to be put into a cage and physically abused?" One of the lab's customers to whom we submitted our investigation results immediately suspended all testing with Huntingdon and conducted its own investigation, saying: "The attitudes and behavior shown by lab technicians on the tape are unacceptable to us."

At approximately the same time as PETA's investigation, a British television station was conducting its own undercover investigation of Huntingdon's British parent company. Huntingdon's British employees were filmed punching a beagle dog in the

face and simulating a sex act during test procedures. Members of Parliament and British citizens were outraged. Not only did the company *not* sue the television station, it fired two employees who plead guilty to charges of animal cruelty. It then scrambled to keep its business license by complying with sixteen stringent requirements under Home Office scrutiny. We find it ironic and distressing that a similar investigation of animal cruelty against the American subsidiary was met with an onerous RICO suit rather than immediate and sweeping corrective action.

Despite the compelling facts, the lawsuit threatened our ability to hold Huntingdon accountable for its actions. The suit was filed by the largest law firm in Boston, with 360 attorneys. It was 80 pages long and contained 20 separate counts. These included three RICO counts which alleged that PETA's earlier animal cruelty investigations dating back to 1989 constituted a pattern of racketeering activity, including mail and wire fraud, transportation of stolen property, and extortion through the creation of a climate of violence against Huntingdon and the other subjects of our investigations. Huntingdon sought damages and legal fees exceeding $10 million.

Early in the case, we were slapped with a gag order which precluded us from further disseminating our findings to the public, and which even prohibited us from cooperating with the USDA investigation of our own complaint, despite USDA requests for our cooperation. Therefore, from the outset of the lawsuit, we faced the dilemma of fighting vigorously at great expense and great risk to our financial security, or knuckling under to Huntingdon's strongarm tactics. We chose to fight at every turn during the ensuing six months of intense litigation.

Ultimately we were vindicated when, as a result of our complaint and its own subsequent investigation, the USDA charged Huntingdon with 23 counts of violating the Animal Welfare Act, including:

- failure to maintain a program of adequate veterinary care;
- failure to ensure that animals used in toxicology tests received pain killers and anesthesia during procedures that caused pain and distress;
- failure to notify a veterinarian when animals needed medical care;
- failure to explain why dogs used in painful procedures were not provided with any relief from pain; and
- failure to construct and maintain cages that protect animals from injury.

Even though we fought hard, did not back down and obtained a satisfactory result in the end, some of the realities of civil RICO actions against nonviolent social advocacy became all too apparent. First, opponents of advocacy groups are permitted to make sweeping allegations of criminal conduct "upon information and belief" with no evidence to support such charges. Second, those broad allegations may permit those plaintiffs to engage in a discovery "fishing expedition" into virtually every aspect of every prior investigation or advocacy campaign. And third, the cost to properly defend against such charges and discovery, and the risks inherent in any litigation create profound impediments to aggressive advocacy work which is so vital to social activism. Thus, the civil RICO plaintiffs are able to extort silence concerning or termination of aggressive activism and research into allegations of misconduct by manipulating and misusing civil RICO actions. The impact of these effects is increased as the size and financial resources of the targeted advocacy group decrease so that the smallest and often the most active groups are most seriously imperiled.

PETA IS AN ADVOCACY ORGANIZATION, NOT A RACKETEER

Regardless of your personal or professional views of PETA's philosophy and our sometimes creative means of communicating our message, PETA and other social change organizations are not racketeers against whom RICO was intended to be used. PETA was founded on and adheres to the ideals of peaceful direct action. Our members and supporters are representative of the country's diverse population, and include members of this House and the Senate, on both sides of the aisle. Our supporters expect and demand that we shine a bright light on animal abuse and that we vigorously challenge society to change its attitudes toward the treatment of animals. Throughout its 18-year history, PETA has worked to expose animal exploitation and abuse wherever it occurs. When PETA hears allegations of abuse, we thoroughly investigate the allegations, report findings to the proper authorities, and expose the abusers by publicizing our findings through our magazine, *Animal Times*, and other outlets. Such are our rights under the Constitution. In this regard, PETA's actions are consistent with those of so many social advocacy groups throughout the history of this country and bear absolutely no resemblance to the violent world of organized crime against which RICO was directed.

Occasionally, our supporters engage in peaceful civil disobedience to call attention to animal exploitation. They may sit down in front of a furrier's doorway, they may unfurl a protest banner from a flagpole, or they may throw colored water on the ground outside a pharmaceutical house to protest the cruel treatment of animals. Such peaceful, forthright action has been the hallmark of social and political protest since the nation's founding. Many have gone further, whether by refusing to pay royal taxes, helping slaves to freedom, organizing unions and fighting for women's right to vote by registering in violation of election laws. The Civil Rights Movement followed the example set by Mahatma Gandhi during India's struggle for independence. The peace movement and the Native American rights movement have continued this vital tradition of direct action to call attention to inequities in our society. Through their actions, advocacy groups have helped this country to evolve, to improve, to move forward.

Undoubtedly, such evolutionary change creates discomfort and even fear among those who seek to maintain the status quo, whether British loyalists, slave owners, union busters, sexists, racists, vivisectors or furriers. Moreover, those opponents of change are often intensely secretive. For example, if someone is body-slamming a monkey into a steel cage, he is not likely to wish the public to see that. But neither the fear of change, the fear of exposure, nor the fear of public protest constitutes the type of organized crime, racketeering, or extortionate threats which RICO was designed to combat.

Isolated acts of violence have taken place in the struggle for all our freedoms and the animal rights movement is no exception. It is possible that people have committed acts of violence against animal abusers after reading our exposés, or seeing the videotapes made by our investigators. But PETA has never engaged in violence or threats of violence against any person or entity, no matter how heinous their animal abuse. PETA has certainly openly disseminated information of animal abuse provided anonymously by those who have claimed responsibility for the liberation of animals from laboratories and the destruction of fur farms. But our reporting is a permitted exercise of our First Amendment freedom just like that of the television station or newspaper which reports the same actions. Because we may be happy for the animals' freedom and the disruption of a cruel practice, does not make us racketeers.

However, by manipulating civil RICO provisions, our opponents allege that our exercise of fundamental First Amendment rights in publicizing evidence of animal exploitation creates a "climate of violence" which somehow makes us responsible for the violent actions of any citizen. Under this theory the television stations and newspapers were responsible for Jeffrey Dahmer's murder in prison because they publicized his crimes and trial. This is patently absurd and contrary to every notion of legal causation and responsibility which are central to our justice system. But this is exactly the functional equivalent of what civil RICO plaintiffs contend in trying to hold peaceful advocacy groups responsible for the actions of people over whom they have no control. Congress must stop the abuse of civil RICO as a scurrilous means of condemning any group or person for the unrelated actions of another.

CURTAILING CIVIL RICO WILL NOT IMPAIR EFFECTIVE REDRESS OF GRIEVANCES

Even with the removal of civil RICO actions against peaceful advocacy groups, our opponents would still retain effective and well-established causes of action for any harm they allegedly incur from actions taken against them. For example, their ability to pursue tort and fraud actions which include possible punitive damages, injunctive relief, and the ability to file criminal complaints all remain unchanged.

PETA PRACTICES WHAT IT PREACHES

PETA officers, directors and employees have repeatedly been the targets of death threats. We receive photographs of ourselves with our eyes poked out, explicit details of our own sexual torture and bloody packages of animal remains. These threats have often contained references to information disseminated by our opponents, including vivisection industry trade groups and animal abusers whom we have exposed. We do not sue our opponents under civil RICO claiming extortion or mail or wire fraud as a result of these activities. Rather, we fight those opponents in open public debates, in the media, in panel discussions, on radio and television talk shows, through letters to the editor, and by aggressively publicizing our views to rebut their positions. That is how it is meant to be in America.

PETA operates on the fundamental idea that the public has a right to know how animals are treated behind the closed doors of testing laboratories, on fur farms, on factory farms, and in degrading entertainment acts.

The public has a right to know that Procter & Gamble continues testing its household products like Tide and Crest on animals in crude, cruel and arcane procedures, even though no law or regulation requires those tests.

The public has a right to know that Premarin, the estrogen replacement drug for menopausal women, the largest selling prescription drug in America, is made from the urine of pregnant mares confined for up to ten months per year in stalls so tiny they cannot turn around or lie down comfortably. Americans have a right to know that the foals who are the by-products of this cruel industry are either sent to slaughter or are used to replace their mothers on the "pee line" when their bodies can no longer bear up under the burden.

The public has a right to know that Ringling Brothers & Barnum and Bailey Circus keeps magnificent elephants in shackles behind the big top and deprives them of the joy and companionship they crave. Recently, the toll of this conduct became all too apparent when Kenny, a three-year old African elephant who had been taken from his mother, died after being forced to perform three shows in one day although known to be sick.

And, surely, the public has a right to know that foxes, chinchillas and other animals live in filth on fur farms, waiting to die by anal or genital electrocution before becoming a coat, trim, or glove lining.

Our efforts to bring these and other facts about the mistreatment of animals to the public are not predicate acts in violation of the RICO Act.

CONCLUSION

This Subcommittee has a unique opportunity to revise the RICO Act in a way that will reinvigorate social debate and to stop civil RICO actions from being used as a club to extort silence from social advocacy organizations. PETA pledges its support to work with the Subcommittee toward this goal.

Thank you for your consideration.

BIOGRAPHY

Jeffrey S. Kerr is General Counsel and Director of Corporate Affairs for PETA. He has been a practicing attorney for eleven years, concentrating in litigation and tax-exempt organizations. As PETA's General Counsel he coordinated PETA's successful defense against the unprecedented civil RICO action commenced in 1997 by a vivisection laboratory which is the subject of the preceding testimony.

Mr. Kerr is a graduate of the University of Virginia School of Law and George Mason University. He is a member of the Virginia, District of Columbia and Missouri bars.

Mr. MCCOLLUM. Mr. Bograd.

STATEMENT OF LOUIS BOGRAD, ESQ., SENIOR STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION

Mr. BOGRAD. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you this morning on behalf of the American Civil Liberties Union to testify on the subject of limitations imposed by the first amendment on the civil application of the RICO statute.

Before I turn to that subject, let me begin by expressing the sincere regrets of Nadine Strossen, the president of the ACLU, that a minor medical procedure prevented her from traveling to Washington to testify herself before you this morning.

The ACLU is a national, nonprofit, nonpartisan organization of more than 275,000 members dedicated to protecting the rights and liberties guaranteed by the Bill of Rights and the U.S. Constitution. Among these rights that we hold dear are both the constitutional right to reproductive choice and also the right to band together in other like-minded persons in political protest activities such as demonstrations and boycotts.

The ACLU has actively supported the right to reproductive choice for years in the courts and elsewhere. The ACLU urged the Supreme Court to interpret 42 U.S.C. Section 1985 to protect the

right to reproductive choice against private conspiracies in the Bray case and supported efforts in Congress to enact the Freedom of Access to Clinic Entrances Act.

At the same time, the ACLU has vigorously defended the right of antiabortion groups to conduct nonviolent protests outside abortion clinics.

The issue under discussion today is further complicated for us by the use of RICO. The ACLU has long been concerned by RICO's broad reach, vagueness and its loose evidentiary standards. The ACLU is one of the very few organizations that, along with Representative Conyers and Representative Mikva, opposed RICO's enactment in 1970.

When the issue of the use of civil RICO against antiabortion protesters first came before the Supreme Court in the case of *NOW* v. *Scheidler,* the ACLU submitted a friend of the court brief articulating what we believed to be the appropriate first amendment limitations on civil RICO liability against political advocacy organizations and their leaders. That brief remains the ACLU's most comprehensive and relevant statement to date with regard to the issues before the committee.

We have submitted copies of this brief in lieu of written testimony, and I understand that it has now been made a part of the record of this hearing. In my oral remarks, I will merely highlight the key points from our brief.

First, it is important to note that there are two separate and equally important first amendment rights at stake in the use of civil RICO against political advocacy groups, freedom of speech and also freedom of association. Both have implications for the scope of potential RICO liability.

There is perhaps a surprising degree of agreement about the free speech issues at stake. In the *NOW* v. *Scheidler* litigation, there was a shared understanding by all parties in the Court that peaceful picketing, debate, meetings, prayers and a host of other forms of peaceful protest are protected by the first amendment and that the lines separating such peaceful protest from criminal and tortious activities such as trespass, extortion, violence and vandalism must be carefully maintained. The former is constitutionally protected, while the latter is properly subject to sanction.

Moreover, the Supreme Court has made it clear that the Constitution does not protect extortion or true threats of violence directed at specific individuals. It does protect hyperbolic rhetoric and threats of social ostracism or even damnation.

Moreover, a defendant's speech or expressive activity can form the basis for direct liability only if the speech is part of a conspiracy or is intended to produce imminent lawless action.

Turning to freedom of association, if sanctions are imposed, it is essential to distinguish between those who are responsible for the unlawful activities and those who are not, especially in a context where lawful, in fact constitutionally protected and unlawful activities often take place side by side. Fortunately, the Supreme Court has dealt with these problems before in other contexts, most significantly in the case of *NAACP* v. *Claiborne Hardware*, and the rules are reasonably well-settled.

When the alleged RICO enterprise is an ideological association, individual defendants may not be held liable unless they had a specific intent to further the association's illegal aims. Guilt by association is not enough.

Second, neither an ideological association nor its leaders can be held derivatively liable for the unlawful activities of its members under RICO or otherwise except upon a finding that the association and/or its leaders authorized, directed or incited the misconduct in question.

Third, defendants cannot be held liable for failing to disavow the violent or criminal acts of others because a legal duty to repudiate, to disassociate oneself from the acts of another, cannot arise unless, absent the repudiation, an individual could be found liable for those acts.

Finally, in a civil RICO action against an ideological association, plaintiffs can only recover from losses proximally caused by the unlawful activity. Losses attributable to lawful, nonviolent activity are not compensable.

I would be happy to elaborate on any of these principles during questions.

Let me conclude these remarks with the concluding paragraphs from our *NOW* v. *Scheidler* amicus brief.

Application of the foregoing principles to civil RICO actions brought against ideological associations will require the lower courts to draw some fine distinctions between protected and impermissible conduct. But such careful line drawing is critical if our courts are to be respectful of the constitutional rights of all of the parties to the underlying dispute: the rights of women to obtain safe and legal abortions free from the threat of violence and the rights of anti-choice protesters to attempt peacefully to dissuade them from this course.

The Supreme Court concluded its opinion in Claiborne Hardware with a command to lower courts to be attentive to such distinctions:

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. It must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity."

Careful attention to the Supreme Court's guidance in Claiborne Hardware and in Justice Souter's concurring opinion in *NOW* v. *Scheidler* itself will go a long way toward protecting both the right to reproductive choice and peaceful protest.

Thank you.

[The prepared statement of Mr. Bograd follows:]

PREPARED STATEMENT OF LOUIS BOGRAD, ESQ., SENIOR STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and members of the Subcommittee on Crime, the American Civil Liberties Union (ACLU) appreciates this opportunity to testify on the subject of limitations imposed by the First Amendment on the civil application of the RICO statute. The ACLU is a national, non- profit, non-partisan organization of more than 275,000 members devoted to protecting principles of freedom set forth in the Bill of Rights to the U.S. Constitution.

For purposes of today's hearing, I submit to the subcommittee for its consideration the ACLU's brief *amicus curiae* submitted to the United States Supreme Court in the matter of the *National Organization For Women, Inc.* v. *Joseph M. Scheidler*. This brief represents our most comprehensive and relevant statement to date with respect to the issues the subcommittee intends to address today.

No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

—v.—

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

In its broadest sense, this case involves several issues of deep concern to the ACLU. A wave of violence and unlawful activity directed at abortion providers around the country has seriously impaired the ability of women to exercise their constitutional right to reproductive choice. That right is one that the ACLU has supported for decades, in the courts and elsewhere. The ACLU has participated in nearly every abortion case decided by this Court since *Roe v. Wade*, 410 U.S. 113 (1973), and lawyers associated with the ACLU have been counsel of record in many of this Court's landmark abortion decisions, from *Doe v. Bolton*, 410 U.S. 179 (1973), to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 112 S.Ct. 2791 (1992). In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S.Ct. 753 (1993), the ACLU urged the Court to adopt an interpretation of 42 U.S.C. §1985 that would protect the right to reproductive choice against private conspiracies. Following the rejection of that argument in *Bray* and the subsequent assassination of Dr. David Gunn in Pensacola, Florida, the ACLU has supported efforts in Congress to enact a new civil rights law designed to curb the epidemic of clinic violence.

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[1] A letter of consent to the filing of all *amicus* briefs has been lodged with the Clerk of the Court by counsel for all parties in compliance with Rule 37.3.

In contrast to *Bray*, the present case has not been brought under a traditional civil rights statute but under RICO, 18 U.S.C. §1961, *et seq.* The reliance on RICO raises separate concerns for the ACLU, which opposed the enactment of RICO in 1970 and has opposed its overzealous enforcement ever since. Many of the ACLU's objections have focused on such due process issues as RICO's broad reach, its loose evidentiary standards, and its draconian forfeiture provisions. But the ACLU has also recognized that the problematic features of RICO carry a special sting in a First Amendment context. For example, in *Alexander v. United States*, __ U.S. __, 61 U.S.L.W. 4796 (June 28, 1993), the ACLU took the position that the use of RICO to seize and destroy the entire contents of a bookstore was irreconcilable with the First Amendment, a view shared in that case by the four dissenting justices. *Id.* at 4800.

Since its founding in 1920, moreover, the ACLU has steadfastly endorsed the position that the "[e]ffective advocacy of both public and private views, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), and that the associational rights protected by the First Amendment include the right to demonstrate, boycott, leaflet and picket. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940). Because of the ACLU's commitment to the First Amendment, it has frequently defended the associational rights of political groups whose ideological views it has vigorously opposed.

In opposing *certiorari*, defendants have argued in this case that the economic motive test embraced by the Seventh Circuit is an appropriate means of ensuring that RICO is not used to abridge their First Amendment rights. In our view, the civil liberties interests at stake are far more complex. The ACLU has never endorsed the view, and this Court has never held, that there is a civil liberties interest in shielding political associations

from liability for their illegal acts. Thus, if plaintiffs are able to prove that defendants engaged in a pattern of illegal behavior designed to interfere with the exercise of plaintiffs' constitutional rights, the fact that defendants were motivated by politics rather than money is no more relevant than it would be if a group of white supremacists claimed a First Amendment right to intimidate blacks seeking to vote. As a matter of constitutional law, the presence or absence of an economic motive is not what distinguishes protected political expression from unlawful acts of violence or terrorism.

Accordingly, the economic motive test seems to us a poor proxy for the civil liberties issues that can and do arise under RICO. The ACLU takes no position, therefore, on whether the Seventh Circuit's interpretation of RICO was correct in this case. However, if the Court remands this case for trial, either by rejecting the economic motive test or by finding that the Seventh Circuit misconstrued the economic motive requirement, *see* n.5, *infra*, we respectfully submit that the Court's decision should include a set of constitutional guidelines designed to mitigate the civil liberties risks that are inherent in virtually every RICO litigation and that are inevitably magnified when RICO is applied in such a politically charged atmosphere. This *amicus* brief is intended to assist the Court in that effort.

SUMMARY OF ARGUMENT

The complaint in this case was filed as a nationwide class action on behalf of women's health centers that provide abortions and the women who seek abortions at those centers.[2] Of central importance at this stage of the

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[2] The class certification motion was still pending when defendants' motion to dismiss was granted. *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612, 615 n.3 (7th Cir. 1992).

proceedings, the complaint charges (on behalf of the clinics) that several individuals and groups who are prominently identified with the anti-choice movement violated RICO by operating the Pro-Life Action Network, an umbrella anti-choice organization, through a pattern of racketeering activity.[3]

The complaint sets forth a long list of illegal and/or harassing activities allegedly committed in furtherance of defendants' goal of closing down abortion clinics around the country. Those activities include:

> extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel and medical laboratories.

National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992).

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[3] For purposes of this appeal, the relevant sections of RICO are 18 U.S.C. §§ 1962(c) and (d). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) penalizes conspiracies to violate any of RICO's substantive provisions, including § 1962(c).

The complaint also refers at several points to meetings and demonstrations organized by the defendants, and to the distribution of a manual written by defendant Scheidler that the Seventh Circuit described as "advocat[ing] unlawful methods of interfering with the operations of women's health centers." *Id.* at 615. Defendants point to these allegations as evidence that plaintiffs are seeking to impose RICO liability based on protected First Amendment activity. *See, e.g.*, Scheidler Op.Cert. at 24-25.

The Seventh Circuit, apparently, did not see the complaint as presenting the same threat to First Amendment interests that defendants perceive. In the Seventh Circuit's view,

> the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

Id. at 616.[4]

In the absence of a trial record, such differing interpretations are not surprising. What is more significant at this pleading stage is the shared understanding by all parties and the court of appeals that, in the event of any trial on remand, the line separating "peaceful protest"

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[4] The RICO case statement submitted by plaintiffs in the trial court alleges numerous instances of the sort of tortious and criminal activity listed in the Seventh Circuit's opinion.

from "criminal and tortious activities" must be carefully maintained. The first is constitutionally protected, the second is properly subject to sanction. Moreover, if sanctions are imposed, it is essential to distinguish between those who are responsible for the unlawful activities and those who are not, especially in a context where lawful and unlawful activities often take place side-by-side.

Fortunately, the Court has dealt with these problems before in other contexts and the rules are reasonably well-settled. The application of those rules to RICO, however, is less well-settled and deserves emphasis.

First, the Constitution does not protect extortion or "true" threats of violence directed at specific individuals. *Watts v. United States*, 394 U.S. 705 (1969)(*per curiam*). It does protect hyperbolic rhetoric and "threats" of social ostracism or even damnation.

Second, when the alleged RICO enterprise is an ideological association, individual defendants may not be held liable unless they played a significant role in the "operation and management" of the enterprise, *see Reves v. Ernst & Young*, 507 U.S. __, 113 S.Ct. 1163 (1993), and had a specific intent to further the association's illegal aims. *E.g., Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

Third, neither an ideological association nor its leaders can be held derivatively liable for the unlawful activities of its members, under RICO or otherwise, except upon a finding that the association and/or its leaders "authorized or ratified the misconduct in question." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982)(citations omitted). Furthermore, a defendant's speech or expressive activity can form the basis for direct liability only if the speech is part of a conspiracy or is intended and likely to produce imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(*per curiam*).

We recognize that the propriety of these standards may never be reached if the decision below is affirmed. We have nevertheless chosen to submit this *amicus* brief because we believe that the clear articulation of these standards will ultimately serve the constitutional interests of all sides in this controversy if this case is remanded for trial.[5]

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[5] If this Court affirms the holding below that an economic motive is required under RICO, the existence of such an economic motive cannot be found in the solicitation of voluntary contributions in support of the defendants' protected associational activities. *See* 968 F.2d at 630. The charitable solicitation of funds is a form of speech protected by the First Amendment. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). As this Court has noted, it implicates several distinct speech interests, including: the interest of the organization in soliciting support; the contributor's expression of support for the recipient organization and its views; and the ability of the organization to communicate its ideas to a larger audience. *See Cornelius*, 473 U.S. at 797-99. RICO liability cannot be based on protected First Amendment activity. *See* pp. 10-16, *infra*. Consequently, the solicitation of charitable contributions cannot be used as proof of an alleged economic motive under RICO unless the charitable contributions were obtained through illegal coercion or fraud.

We do not take any position in this brief on whether the economic motive test could be met by proof that defendants' activities "were aimed at increasing the plaintiffs' costs of doing business." *Scheidler*, 968 F.2d at 630. Likewise, we express no view on whether it is sufficient to show that defendants committed economic crimes to bankroll their political activities. *See, e.g., United States v. Baqaric*, 706 F.2d 42, 55-57 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). These issues will need to be resolved if the Court finds that an economic motive test is appropriate.

ARGUMENT

ANY FUTURE PROCEEDINGS IN THIS CASE SHOULD BE TAILORED TO PROTECT THE CONSTITUTIONAL RIGHTS OF ALL PARTIES

If this case is remanded for trial, the trial court will be facing a sensitive task. On the one hand, defendants may not claim any constitutional immunity for unlawful activities designed to interfere with the exercise of plaintiffs' constitutionally protected rights. On the other hand, plaintiffs may not rely on RICO to thwart defendants' lawful political protests even if those protests have the effect of discouraging some women from obtaining lawful abortions. Similarly, defendants may not escape liability for unlawful activities that they authorized, ratified or incited, even if the unlawful activities were actually performed by others. Conversely, any finding of liability must rest on something more than a theory of guilt by association, especially in a context where lawful and unlawful activities are often mixed together.

Although this delicate balance is not unique to RICO, the risk of miscalculation is increased by the amorphous nature of RICO itself. Moreover, the cost of misapprehending the appropriate constitutional lines is magnified under RICO by the availability of treble damages. If the use of RICO is to become commonplace in cases of this sort, RICO lawsuits must proceed with an understanding that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 908. As this Court clearly stated in *Claiborne Hardware*:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the

> context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Id. at 916-17 (footnote and citation omitted).

This statement of principle arose out of a dispute between white merchants in Claiborne County, Mississippi and the local branch of the NAACP, which had organized a seven-year boycott against local businesses that were resisting racial integration. Relying on the fact that some boycott supporters had resorted to violence, the Mississippi courts declared the entire boycott illegal, and awarded crippling damages against the NAACP. This Court unanimously reversed in an opinion that carefully distinguished protected political activity from actionable conduct.

As a threshold matter, the Court ruled that the plaintiffs could only recover for losses proximately caused by unlawful activity; business losses attributable to lawful, nonviolent boycott activity were not compensable. *Id.* at 918. The Court next ruled that individual NAACP members could not be held liable based upon their mere participation in the boycott:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Id. at 920. Finally, the Court ruled that the NAACP

could not be held liable for acts of violence committed by boycott participants unless the organization had authorized or ratified their actions. *Id.* at 930-31. "To impose liability without a finding that the NAACP authorized -- either actually or apparently -- or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.* at 931.

Each of these principles has relevance here and is likely to be relevant in most other cases where RICO is used against organizations that are accused of seeking to further their ideological goals through unlawful as well as lawful means. Most fundamentally, lower courts confronting RICO claims against ideological associations must carefully distinguish between unlawful conduct, which may give rise to civil liability, and protected conduct, which may not. Here, the shared understanding that this line must be drawn, *see* pp.5-6, *supra*, lessens but does not eliminate the risk of constitutional overreaching.

For example, the complaint in this case includes allegations that the defendants engaged in acts of "physical and verbal intimidation and threats directed at health center personnel and patients." 968 F.2d at 615. An allegation of this sort may or may not present constitutional problems depending on what it actually means and how it is proven. The Constitution does not protect "true" threats of violence directed at specific individuals. *See Watts v. United States*, 394 U.S. at 708. "Threats" of ostracism, vilification or eternal damnation, by contrast, are constitutionally protected speech.

> The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment . . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's . . . practices. Those

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> practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But, so long as the means are peaceful, the communication need not meet standards of acceptability.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); *see also Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment").

This distinction is as critical under RICO as it was in *Claiborne Hardware*. The central claim in the present complaint is that defendants have violated 18 U.S.C. §1962(c) by operating a RICO enterprise (the Pro-Life Action Network) through a pattern of racketeering activity that includes multiple predicate acts of extortion, which are described at great length in the RICO case statement. *See* n.4, *supra*. In evaluating that claim, it is essential that the lower courts not confuse protected political activities with criminal extortion or use evidence of protected political protest to establish a pattern of racketeering activity.

At the same time, it is equally important for the lower courts to resist the claim that the First Amendment is a shield for criminal behavior. The First Amendment requires a distinction between political protest and criminal extortion. It does not immunize criminal extortion because it is engaged in as a form of political protest.

In similar fashion, the First Amendment compels caution before imposing RICO liability on individual defendants allied with ideological organizations that have both legitimate and illegitimate aims. The Court has long recognized that the imposition of liability under these circumstances poses special constitutional risks:

> There is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

Noto v. United States, 367 U.S. at 299-300; *see also Scales v. United States*, 367 U.S. at 229-30 (a "blanket prohibition of association with a group having both legal and illegal aims" would create "a real danger that legitimate political expression or association would be impaired"). For this reason, membership in such an organization may not be punished unless an individual joined the organization with knowledge of, and a specific intent to further, its illegal aims. *Claiborne Hardware*, 458 U.S. at 920; *Healy v. James*, 408 U.S. 169, 186 (1972). This constitutional requirement is separate from, and in addition to, RICO's statutory requirement that the defendant participate in the operation and management of the RICO enterprise. *See Reves v. Ernst & Young*, 113 S.Ct. 1163.[6]

Because RICO liability does not turn on mere membership (unlike the Smith Act prosecutions at issue in *Scales* and *Noto*), these constitutional concerns will not normally come into play. There are, nonetheless, cases in which a defendant's participation in an association's activities will be proffered as circumstantial evidence of a RICO violation. It is precisely this circum-

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[6] Thus, one could be a director of an ideological association and committed to its political goals, and yet be personally opposed to furthering those goals through unlawful means. Alternatively, a supporter of the same organization might have the intent to engage in the illegal actions, yet not be involved in the association's operation and management. In neither case could the defendant be held liable under RICO.

stantial inference that is not constitutionally permissible with an ideological association unless there is evidence of a defendant's specific intent to further the illegal aims of the association. Under RICO, that burden will frequently be met by evidence that the defendant is culpable for two or more predicate acts of racketeering activity, a required element in most RICO offenses.[7]

Any effort to hold a RICO defendant vicariously liable for someone else's unlawful behavior in cases of this sort must also be judged against First Amendment standards.[8] *Claiborne Hardware* again establishes the guide-

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[7] This will not always be true in RICO claims brought under § 1962(d), the conspiracy provision. There is a split in the circuits as to whether a defendant charged in a RICO conspiracy must personally agree to commit two predicate acts of racketeering activity or whether it is sufficient that he agree that two predicate acts be committed. *See, e.g., Pryba v. United States*, 498 U.S. 924 (1990)(White, J., dissenting from denial of *cert.*). The majority of circuits have adopted the latter position. *See United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990)(collecting cases). In these circuits, in particular, there is a danger that a court might attempt to infer a defendant's agreement from his participation in the operation of the ideological association and the commission by his "co-conspirators" of acts of racketeering. The First Amendment forbids this inference without some direct evidence of the defendant's specific intent to further the organization's illegal aims. *Claiborne Hardware*, 458 U.S. at 918-19; *see also DeJonge v. Oregon*, 299 U.S. 353, 365 (1937):

> If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

[8] Lower courts have consistently held that a civil RICO defendant may be held vicariously liable for predicate acts of racketeering as an aider and abetter. *See, e.g., Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356-60 (3d Cir. 1987).

lines. In that case, the plaintiffs sought to hold Charles Evers, the NAACP's Field Secretary in Mississippi, liable on the basis of several speeches he had given in which he called for violence against boycott breakers. The Court ruled that these speeches alone could not provide a basis for liability:

> There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

458 U.S. at 927. Because there was no other evidence that Evers had authorized, ratified, or directly threatened unlawful conduct, nor any evidence that his remarks had precipitated violence by others, the judgment against him could not be sustained. *Id.* at 927-29.

The same rules should apply to the present case. The individual defendants cannot be held liable based upon speeches advocating or endorsing unlawful action unless defendants' words (1) authorized, ratified or directed the illegal actions, or (2) constituted illegal incitement under the test set forth in *Brandenburg v. Ohio*, 395 U.S. at 447:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such

> advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Likewise, the defendants cannot be held liable for failing to disavow violent or criminal acts, because "[a] legal duty to 'repudiate' -- to disassociate oneself from the acts of another -- cannot arise unless, absent the repudiation, an individual could be found liable for those acts." *Claiborne Hardware*, 458 U.S. at 925 n.69.

Claiborne Hardware also establishes the rules of liability for the organizational defendants in this case -- Operation Rescue, the Pro-Life Action League, the Pro-Life Direct Action League, and Project Life. They may be held responsible for the acts of their agents undertaken within the scope of their actual or apparent authority. *Id.* at 930, citing *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). They may also be held liable for other action of which they had knowledge and specifically ratified. 458 U.S. at 930. However, they may not be held liable for the actions of their supporters undertaken without their authorization or ratification. As this Court concluded in *Claiborne Hardware*:

> To impose liability without a finding [of actual or apparent authorization or ratification] would impermissibly burden the rights of political association that are protected by the First Amendment .... "The rights of political association are fragile enough without adding the threat of destruction by lawsuit."

Id. at 931-32, quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966)(Douglas, J., dissenting from dismissal of *cert.*).

Application of the foregoing principles to civil RICO actions brought against ideological associations will re-

quire the lower courts to draw some fine distinctions between protected and impermissible conduct. But such careful line drawing is critical if our courts are to be respectful of the constitutional rights of all of the parties to the underlying dispute: the rights of women to obtain safe and legal abortions free from the threat of violence and the rights of anti-choice protesters to attempt peacefully to dissuade them from this course.

This Court concluded its opinion in *Claiborne Hardware* with a command to lower courts to be attentive to such distinctions:

> The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott . . . [It] must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

458 U.S. at 933-34.

CONCLUSION

The epidemic of violence against abortion clinics throughout the country demands a strong remedial response. The use of civil RICO as that remedy, however, poses its own problems. Accordingly, if a remand is ordered, we respectfully urge the Court to use this case as an opportunity to establish a clear set of constitutional guidelines for the lower courts, modeled in large measure upon the decision in *Claiborne Hardware*. In our view, such guidelines will go a long way toward protecting both the right to reproductive choice and the right to peaceful political protest.

Respectfully submitted,

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Dated: August 13, 1993

Mr. MCCOLLUM. Before I begin the questioning, Mr. Conyers requested that his statement be submitted to the record, and without objection it will be so placed into the record.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Today's hearing is about encouraging violent anti-abortion protestors. Emily Lyons is living proof that far from the innocent free speech activists you will hear them described as at this morning's hearing, many anti-choice activists, including Joseph Scheidler, who was found liable for extortion under RICO by a unanimous Chicago jury, advocate for exactly the type of violence that resulted in Ms. Lyons injuries.

This morning, you will hear the Republican majority propose that we amend civil RICO to prohibit its use against extortion. They will argue that the extortion provision is used against those who do no more than advocate a position.

This is simply untrue. Extortion is defined in the United States Code (title 18 sec. 1951) as "the obtaining of property from another, with his consent, induced by wrongful use of *actual or threatened force, violence or fear*, or under color of official right."

So, the majority actually wants to eliminate penalties for using of threatening force or violence at abortion clinics. The majority doesn't seem to mind that clinics are routinely the subjects of bombings and acid attacks and that the people who work at those clinics are often injured and sometimes killed.

Real civil advocacy is already protected by the First Amendment. People involved in such advocacy cannot be found liable under RICO. But, if the majority believes the First Amendment is inadequate, then Mr. McCollum should propose legislation to provide that civil RICO cannot be used against civil advocacy groups. I would be happy to support such legislation.

I am appalled by legislation aimed solely at allowing threats of violence and actual violence to be used against abortion clinics. Passage of this legislation is an open invitation to every violent protestor in the country to go ahead and threaten violence without fear of the serious repercussions provided by FJCO.

Mr. MCCOLLUM. I will yield myself 5 minutes for questioning.

First of all, I want to thank each of you for coming today. I think you represent the best intellectual minds that we can possibly have here today. You have each made a point, and one of the most concise points has been that this is not an issue of the left or right or pro-life or pro-choice. It is an issue of civil liberties. It is an issue of do we reform, do we need to reform the RICO laws with respect to those provisions which may impair the right of peaceful protest, and I think each of you have contributed vitally, and I thank you for that.

Mr. Brejcha, what were the acts that the jury found to be extortion in the Scheidler case?

Mr. BREJCHA. Mr. Chairman, the verdict form purported to be one with special interrogatories. It was so labeled, but, as Professor Blakey pointed out, it was a series of general verdicts. There were questions as to whether each defendant engaged in acts or threats of violence, yes or no. The jury form was marked yes, and next to that was number of acts and then there was a number given.

It is not clear from that verdict form, nor will we ever know, which defendant was actually found to have committed which act. Or to take it further in, and this reflects the reality of the case, which alleged co-conspirator or which alleged fellow traveler with the enterprise, that is somebody connected with pro-life movement in some way who was at one of a series of meetings of this pro-life action network, which is generally a series of meetings held annually attended by various activist groups, someone who went to

one of those meetings may have committed an act of violence and this would have been marked as a yes and then attributed vicariously to the defendants.

So what the jury found was that these defendants would be held, yes, accountable or guilty or liable for unknown acts, among the many that were put in evidence, by unknown actors, among the many persons alleged to have committed various acts put before the jury.

Mr. MCCOLLUM. So we don't know whether any of the acts which they found as the basis for this were violent acts, although you did imply that there were violent acts by some individuals present; is that correct?

Mr. BREJCHA. Yes. The plaintiffs accused the defendants of word games, and my distinguished opposing counsel does that in her submission. The word games were played by the plaintiffs. The plaintiffs urged a definition of violence that included what has historically been in this country nonviolent peaceable direct action, as outlined eloquently by Dr. King in the letter from the Birmingham jail. That is putting your body passively on the ground, blocking access and then going limp on arrest. Although that is not necessarily an element of it. Some people cooperate with arrest. But that was the classic tactic used by Randall Terry's group, Operation Rescue, was assailed before our jury as a violent tactic. That was indeed the heart of the plaintiffs' theory in this case.

Mr. MCCOLLUM. Did any of the acts involve physical touching of any of the clinic workers?

Mr. BREJCHA. There was proof adduced of specific instances that occurred across the 15-years spanned by the allegations in the case.

For example during the 8, 9, 10 weeks of the Atlanta demonstrations during the Dukakis convention in 1988, Operation Rescue went down there with Randall Terry at the head of it; and they had, in 8 to 10 weeks, thousands of arrests. During that entire period there was evidence, one, that one clinic administrator was attacked and choked on her neck; and a photo of her bruised neck was shown to the jury.

Two, Lieutenant Purdum of the Atlanta Police Department testified, and he was the coordinating officer in charge of all of those demonstrations, and he testified that once somebody attacked him and hit him in the back and in the rib cage. That person, of course, was prosecuted and convicted.

Apart from those two instances during those many weeks of demonstrations, the only violence alleged about Atlanta was the fact that people blocked access repeatedly; and, of course, they went to jail.

Mr. MCCOLLUM. How long did the discovery phase take in this case?

Mr. BREJCHA. Mr. Chairman, the discovery case began after the first round of motions to dismiss were denied in late 1987. It went on almost up to the moment that Judge Holderman in Chicago granted the fifth successive motion to dismiss that we filed, and that led to the Supreme Court appeal. That covers 4 years of discovery.

Mr. MCCOLLUM. With how many depositions?

Mr. BREJCHA. The depositions cover shelves in our offices, those that our clients had written up. I would say that there were at least 40 to 50, if not more.

Mr. MCCOLLUM. And at what cost was this discovery phase alone?

Mr. BREJCHA. The cost was incalculable. We have kind of lost track.

Mr. MCCOLLUM. In the thousands of dollars? Hundreds of thousands of dollars?

Mr. BREJCHA. Hundreds of thousands of out-of-pocket costs alone. We were at a point where we could not afford to cover, defend some of these depositions. We had to split up with codefendants' counsel. And a couple of times, frankly, somebody dropped the ball, and we missed a communication, and a couple of these witnesses were undefended.

Mr. MCCOLLUM. You are saying out-of-pocket costs. You are not counting attorneys' fees in that?

Mr. BREJCHA. Absolutely.

Mr. BLAKEY. I argued the Scheidler case in the Supreme Court. It was pro bono. That is not what my normal hourly rate is.

Mr. MCCOLLUM. I understand. So this is a very expensive proposition for out-of-pocket costs, and everything else was pro bono. If you had attorneys' fees being charged, this would have been a very, very expensive case?

Mr. BREJCHA. That is without question. If a protest group had a budget and say it was well financed and had money in the bank, the pressure to settle this kind of case would be absolutely enormous. The dangers of an adverse verdict, as Mr. Bograd said, for the Civil Liberties Union, there are a lot of vague provisions here. It is hard to predict what a judge is going to do in a highly charged political case. I said 4 years of discovery, that was just phase one. We just finished phase two, which was 3 years.

Mr. MCCOLLUM. Ms. Jackson Lee, you are recognized for 5 minutes.

Ms. JACKSON LEE. Thank you. And let me thank you publicly. I asked a question yesterday in markup on the date rape drug and you had indicated of its pending hearing. My staff had not been informed, but I understand our staffs are working diligently to get a date, and I want to thank you for that.

I would like to also thank the ranking member for his vision for this hearing as well, Ranking Member Conyers, in terms of expanding the hearing and responding to the concerns that I had, seeing someone who is in this room visibly in pain from some of the heinous and egregious attacks that we have experienced on abortion clinics.

Let me say the only reason that I am here is to strike out in outrage and find a way to put forever behind the walls of incarceration, and if anyone thinks that this is an extreme position, it is the right position for the heinous acts that people have had to experience, women, physicians, those patients that have had the need to be at women's health clinics are far beyond my imagination. And so my questions, Mr. Chairman, will be directed along those lines.

First, let me say to Professor Blakey, I know that I am looking younger and younger by the day, but I was one of your staff coun-

sels on the Select Committee on Assassinations. So I am delighted to see you again and, obviously, you are in a far more prominent position than I am today, but I welcome you to the United States Congress today.

Mr. BLAKEY. I take credit for all of the good things you have done since you worked for me.

Ms. JACKSON LEE. I thank you, Professor Blakey.

Mr. CONYERS. Would the gentlelady yield?

Ms. JACKSON LEE. I am delighted to yield.

Mr. CONYERS. We take credit for all of the good things you have done, too.

Ms. JACKSON LEE. Let me say to Mr. Bograd that in most instances, of course, those of us maybe on this side of the aisle are in great agreement with the ACLU, but let me say today I have great concern with your positions, but that is the right of the first amendment and the freedom of speech.

Let me cite for you the term "extortion." Extortion means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence or fear or under color of official right.

Now, you have offered in your testimony, as I understand, that nonviolent advocacy groups should not be subjected to the extortion issue, which maybe we should have a separate piece of legislation on that.

My question would be, where do we go with taking RICO out of the RICO—excuse me, taking extortion out of the RICO statute? And let me cite for you the case of Joseph Scheidler who was convicted in Chicago and read for you very briefly the instructions of the Court to the jury and the findings.

They found that there were 21 acts or threats involving extortion against a patient, prospective patient, doctor, nurse, clinic employee in violation of the Federal law. They found that there were 25 acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee in violation of the law of any State. They found 25 acts, attempt or conspiracy to do any of the acts listed above.

They found that there were 23 acts of traveling across State lines or the use of mail to telephone with the intent to commit or facilitate an unlawful act such as extortion under State or Federal law.

In Houston just 10 days ago, we had chemical terrorism. When they inquired of those in the clinic, they said, "We want to say nothing. We just want it to go away. We don't want anybody to talk to us." Intimidation, fear of utilization, shutdown. Extortion.

We have got to find a way to eliminate this violence and this freedom to commit violence. I can be in Houston, and next week who knows where.

So, gentleman, I would simply say that we have a crisis on our hands. To my good friend from the ACLU, I believe in the first amendment, but when there is a crisis of the likes of the Civil Rights Acts of 1964 and 1965, the terrible tragedies of those deep South killings and hangings of the fruit on the Mississippi trees——

And I would ask the chairman for an additional 2 minutes. I do have a question. I apologize.

Mr. MCCOLLUM. Without objection.

Ms. JACKSON LEE. When you saw that fruit on the Mississippi trees, we acted by way of law. We cannot find the culprits and penalize them without harsh and direct and swift treatment.

My last point, and I inquire of you your response, and I appreciate if all of the gentlemen would answer, how do you respond? Because I have requested both a meeting with the FBI director and the attorney general on these very issues, directly assessing again, despite the FACE Act, we have a problem, and I think RICO stands as a place or a tool to deal with that crisis. And I think, without abusing the next panel and the witness who has come in her bravery, if any of us personally had to experience what she has experienced, I can't imagine that we would be here today talking about eliminating the extortion provision out of that, and I would appreciate the gentlemen's response.

That is my only question, Mr. Chairman.

Mr. BLAKEY. Congresswoman, there is an ambiguity when you use the term "extortion." Its early common law meaning meant obtaining property. Either I got it or I got it for someone else.

If I come up to you and I have got a stick and you are on a bicycle and I say, "Give me your bicycle or I will smack you in the mouth," that is robbery.

If I come up to you behind your back and take your bicycle, that is larceny.

If I come up to you and say, "I don't want you riding your bicycle in my neighborhood anymore," that is coercion, I don't get the bicycle.

Common law always dealt with extortion as a property law offense. And what has happened in these cases, it has been expanded to a coercion offense. Extortion protects property, coercion protects autonomy.

I have no objection to keeping extortion in the property obtaining sense in the statute. That is what it was put there for.

When you extend extortion to coercion, first amendment values. If I come to you and say, "I don't want you to continue what you are doing," that is typical of the nonviolent advocacy.

What I suggest you do is go back and read what I know you are familiar with, *NAACP* v. *Claiborne*, and take out NAACP and put in PLAN and take out advocacy for civil rights and put in advocacy for not having abortion. Everybody is free to define their own dream in this country—with abortion or without abortion. Note that in *NAACP* v. *Claiborne,* there were shootings and bricks thrown through windows. There were people who had their pants taken and rear ends spanked.

You then have the question of the lawful activity of the boycott and the unlawful activity of the boycott. How do you hold responsible Aaron Henry and Charles Evers for the violent activity of some of the people and differentiate that from the nonviolent activity of other people? That is a tough problem, and it is only partly done with this bill.

My suggestion to you is redefine extortion to mean only "property obtaining." Get the coercion part out, and the statute won't threaten advocacy groups from whatever perspective. Leave in the truly violent. Obtaining property by violence? Leave it in. Leave in mur-

der and arson. And, incidentally, strengthen this bill so that the nurse who we are going to hear from who suffered personal injury can have a claim under RICO.

Remember four little girls in Birmingham in the church that was bombed? They had no claim under RICO because it was bombed?

Instead of having an argument over abortion, strengthen it to protect personal rights as well as property rights. Change it in that respect.

Get out of extortion the one part of it that puts in danger advocacy. This is not just a RICO question. *NAACP* v. *Claiborne* was not a RICO prosecution; it was an interference with business tort under Mississippi law. Even if we do something about RICO here, the misuse of other statutes antitrust, State torts—is still a possibility.

We have to codify and extend first amendment limitations so that when you litigate against a person and there is lawful conduct and unlawful conduct and there are groups, I am held responsible for the unlawful conduct and the lawful conduct. We must act with the "precision of regulation" required by the Supreme Court.

You have to deal with all first amendment litigation. You should make this first amendment litigation reform rather than RICO reform. If you do, then all of a sudden the polarization over RICO is gone. This is a first amendment issue. This is about violence. Then think you have a bill that everybody could sign on.

Ms. JACKSON LEE. So you are not talking about eliminating the extortion provision. You are talking about revising the extortion provision, which is not what we are here—which gives us another opportunity other than what we are presently discussing?

Mr. BLAKEY. You have got to get coercion out of extortion.

For example, Joe Scheidler may have engaged in coercion, but he didn't engage in extortion. He didn't want the clinic. He wanted to shut it down. That is coercion.

Ms. JACKSON LEE. It is a fine line I appreciate, Professor Blakey. He did not want the clinic, but he took the clinic because it did not function any more. There is a fine line there. The property of the owner was taken because they could not utilize it for what they wanted to utilize it for.

Mr. BLAKEY. It was destroyed, and if the predicate offense had been malicious destruction of property, you are home free. But we specifically excluded riot or malicious destruction of property or trespass from RICO in 1970 because we didn't want it used against anti-war demonstrations. We made it a property offense only.

The people who demonstrated in *NAACP* v. *Claiborne* didn't want the businesses. They wanted an opportunity to shop in them. That was possibly coercion. It was not extortion. So what we have to do is guarantee the relevant offense is extortion, "obtaining property"—not "depriving somebody else of property."

If you want to charge these people with malicious destruction of property, do so under State law, but don't put malicious destruction of property into extortion. That is the first thing.

Secondly, however you define RICO to include violence, say kidnapping and arson, guarantee if you are in an organization where somebody else engages in arson and murder, but not you, when you

are tried in that case, your first amendment rights will be respected. These are two separate things.

The bill you have before you is a "rifle shot" at extortion that, unfortunately, turns out to be a "blunderbuss." It takes it all of the way out. I think you need to make a surgical strike and divide extortion and coercion.

Mr. MCCOLLUM. I know that Ms. Jackson Lee wants to hear from all the panel. I am going to ask the rest of the panel to answer briefly. Professor Blakey, that was an excellent response, but we have got another panel, and we have a very short day today. Mr. Bograd?

Mr. BOGRAD. Thank you, Mr. Chairman; and I appreciate the opportunity to respond to Representative Jackson Lee's question. We do, in fact, consider her a friend in so many contexts, and I am sorry that you were not here during my opening remarks because I don't know that we disagree on the issues before the committee today.

We are not here to endorse the legislation that is actually pending before the subcommittee. We are here to talk about the independent limitations that the first amendment itself imposes on civil RICO liability and other forms of civil tort liability.

I can join in some of the remarks of Professor Blakey concerning guilt by association and the slopping over of liability from the conduct of one individual to another.

We think there is no fundamental incompatibility between the use of civil RICO and the first amendment so long as civil RICO is used in accordance with—applied in accordance with the first amendment guidelines that were laid down by the Supreme Court in the Claiborne Hardware case and in Justice Souter's concurrence in *NOW* v. *Scheidler* itself.

We do not desire to see plaintiffs deprived of a tool to protect themselves against violent acts of extortion and other forms of violent acts. In fact, one of the examples that we used in our brief was the possibility of a Klansman in the South visiting black families and threatening them with violence where they do exercise their right to vote or attempt to move into a white neighborhood. That is precisely the kind of extortion activity that we do think should be properly actionable, whether it occurs against an abortion clinic or a black family in a white neighborhood.

So I don't think that we have a fundamental disagreement. We are concerned that RICO be properly cabined in accordance with the limitations that the first amendment imposes.

Mr. KERR. Just very briefly, PETA has two fundamental concerns. The first is our whole focus is about exposing and publicizing animal abuse and exploitation. Those are issues that probably a vast majority of the public feels that they have a right to know about. That is where we are focused.

The problem is that that in some way is being deemed to be racketeering because, based upon the information that is being disseminated about that abuse, much of which are violations of law itself, people are undertaking certain activities of their own accord. Maybe because they are reading what we are publicizing, maybe they are seeing it on television, and you have this problem of the vicarious liability where the animal rights movement in our case

is being painted with this broad brush that somehow one group or a couple of groups or one or two people are somehow responsible for or controlling these actions of people all over the country who we have no knowledge of, and I think that vicarious liability and that lack of causation is the biggest concern that we have in the application of RICO.

Mr. MCCOLLUM. Mr. Brejcha, would you like to respond?

Mr. BREJCHA. Congresswoman, I would like to have a long discussion about some of these matters. My sense is that you don't stop violence by outlawing associations formed for the purpose of conducting crusades involving nonviolent, peaceable civil disobedience. That is the sum and substance of what happened in *NOW* v. *Scheidler*, and we deplore as strongly as anybody physical injury, especially done to this lady in Birmingham. We deplore it. We are against it. We are against violence. That is the essence of pro-life activism.

Thank you.

Mr. VOLOKH. Many of the big social protest movements in U.S. history have done three things. They have engaged in, first, constitutionally protected speech, second, nonviolent illegal conduct, and, third, some portions of them have engaged in violent illegal conduct. The question, it seems to me, is should RICO apply only to the violent illegal conduct or also to the nonviolent legal conduct? And that is, it seems to me, the question that faces the committee.

Mr. MCCOLLUM. Mr. Gekas, you are recognized for 5 minutes.

Mr. GEKAS. I thank the chair.

Mr. Blakey, is it the Order of the Coif or Coif?

Mr. BLAKEY. Coif. Unfortunately, my pronunciation will not be translated into the written record, so nobody learns anything by this exchange.

Mr. GEKAS. Thank you. I can sleep easier this evening.

Mr. Bograd, in the statement by Mr. Blakey he asserted in 1969 and 1970, when RICO was first being fashioned, that the ACLU actually signed on to the modifications made prior to final enactment to remove some of the questions about demonstrators and that the ACLU approved of that movement before the bill was up for vote. Does that comport with your historical record?

Mr. BOGRAD. Mr. Gekas, I confess I was not there in 1970, unlike Professor Blakey. I can't answer for sure. I can say what he said sounds plausible to me in the sense that the principal focus of our objection to RICO in 1970 was a due process concern with its breadth, its vagueness, its extraordinary forfeiture provisions, not—the primary principal focus was not on its direct applicability to protest activities. If the explanation was the decision to include a specific list of predicate acts, I don't know.

Mr. GEKAS. You went on to say that you opposed final passage. Is it because it had this amorphous nonboundary capacity to involve itself as it has over the years in these many types of situations? Is that the reason that the ACLU opposed it at that time?

Mr. BOGRAD. Yes. Our concern was that the statute was so broadly defined and permits the introduction of such sweeping evidence in a variety of contexts, civil as well as criminal, that it threatened due process rights in a number of respects.

Mr. GEKAS. Then you adopt or present as your evidence your amicus brief in the Scheidler case; is that correct?

Mr. BOGRAD. Yes, it is.

Mr. GEKAS. And you state and this is—I am not sure what your position really is—you state that the application of the foregoing principles to civil RICO actions brought against ideological associations will require the lower courts to draw some fine distinctions, et cetera, et cetera.

I can't draw from here whether you have a position on it or are waiting for further guidelines from lower courts?

Mr. BOGRAD. No. The position—we actually articulate the specific guidelines in that brief, Mr. Gekas.

Mr. GEKAS. We look to the guidance provided in *NAACP* v. *Claiborne Hardware* most particularly but also in cases such as *U.S.* v. *Scales and Noto* which prohibit liability based on mere association with an ideological organization, and we articulate in the brief the particular guidelines that the lower courts would need to enforce.

What we were saying is that these are often fine factual distinctions which need to be drawn on a case-by-case basis and the courts would need to be careful in distinguishing protected political advocacy from true threats of violence, in distinguishing the conduct of individuals who were themselves either directly responsible for criminal acts or directed that such acts occur from the mere presence of individuals in protest activities where others engaged in criminal conduct. Those sorts of distinctions which we can articulate very well as a legal matter but as a factual matter need to be resolved on a case-by-case basis.

Mr. GEKAS. Can we draw from that there would be no logical reason to assume that the ACLU opposed the Shadegg proposal on the extortion definition?

Mr. BOGRAD. We are not supporting the bill in the form—in its present form, as I understand it. We would certainly be delighted if Congress took it upon itself to engage in a dramatic limitation of the RICO statute in any number of ways.

But we share Professor Blakey's concern that what we are looking at today is an approach targeted at a particular context and a particular case in fact that does not address the deeper, underlying concerns that we have with the statute, but we would be happy to talk with the committee.

Mr. GEKAS. If you opposed it at the start in 1970 because of this cloudiness about where it will extend and we recognize that extortion is one of these vague extensions unless we adopt the Shadegg language, it seems to me that you should be coming down foursquare in support of this legislation. It narrows RICO. It carves out this little area in which it could be improved without touching on the rights of demonstrators, et cetera. I am a little puzzled by the amorphous position of the ACLU.

Mr. BOGRAD. I have to disagree with your premise. There are many problems with RICO, as I have indicated, and we are certainly in favor of seeing the statute limited in appropriate ways. It is not clear to us that the particular problem with RICO is the existence of extortion as a predicate act.

So long as we have civil RICO on the books, we are concerned about legislative remedy that targets a particular narrow factual context and deprives victims of certain extortionate behavior of a valid legal remedy. We are not interested in looking at remedies that focus—that are tailored to a unique and unusual factual situation but rather at remedies that focus more directly on the first amendment concerns that we have articulated both in the brief and in my testimony this morning.

Mr. GEKAS. Mr. Chairman, I yield back the balance of my nontime.

Mr. MCCOLLUM. Thank you.

Mr. Conyers, you are recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to commend Sheila Jackson Lee for what I think is a very important question and the fact that all of the witnesses were able to respond to it.

I want to thank Professor Blakey for his usual expert lecture on the subject of which he reputedly knows more about than any person on planet Earth; and it was, as usual, insightful, not without some humor and very, very informative. I thank you for your contribution today.

I want to agree with Attorney Brejcha in that this subject does require much more examination than can be given to it under the circumstances that bring us here today, and I urge Chairman McCollum to schedule additional hearings around this subject. And I would also, Attorney Brejcha, like to make time available for you and other members, not necessarily in a formal hearing, to continue this discussion about this very, very important matter.

Mr. BREJCHA. Thank you very much, Representative Conyers, and I would be happy to accept such an opportunity.

Mr. CONYERS. How long were you involved with the NOW case?

Mr. BREJCHA. I have been involved since the inception.

It started in Delaware. There was a public interest law firm in Chicago, Americans United for Life, and they took the front seat during the initial round of briefing, and I was helping them in the background. When the motions were denied, they needed somebody with more experience to do depositions, and I have been in since 1987.

Mr. CONYERS. What are we talking about, a dozen years or more?

Mr. BREJCHA. I am not that quick on math, Mr. Conyers. Eleven years, twelve years, give or take a few.

Mr. CONYERS. And this case is not resolved yet?

Mr. BREJCHA. Well, it most certainly is not. No judgment has been entered; and if one is entered against us, as Mr. Blakey said, we would appeal. I am looking for a favorable result in the trial court.

Mr. CONYERS. So, in other words, your presence here today with the suggestion that the legislation that has been proposed and some which has been introduced and others which has been brought forward in the testimony would have a profound effect on the outcome of this case, would it not?

Mr. BREJCHA. I would suppose it would, Congressman.

Mr. CONYERS. I suppose it would, too.

Mr. BREJCHA. I think it is fundamental.

Mr. CONYERS. You are still representing the group in *NOW* v. *Scheidler*, and so your appearance here is another form of advocacy, which is perfectly permissible?

Mr. BREJCHA. I trust that it is permissible.

Mr. CONYERS. It is. It is welcomed before the committee, but we just want to identify it in the course of these discussions.

So there are those that propose that we help your case along, a 12-year-old case, by changing the law. And it may be—I am still going to be looking into this and visiting this subject, but it may be based on the mistaken impression that extortion can be equated with nonviolent advocacy.

Mr. BREJCHA. Mr. Conyers, that was a central——

Mr. CONYERS. Wait a minute. That wasn't a question.

Mr. BREJCHA. I am sorry. I didn't mean to interrupt.

Mr. CONYERS. It may be that if this is a misunderstanding because we have gone through civil rights violence, and my recollection of the civil rights movement—and I may have had more to do with it than anybody in this room—was that where there was violence it was visited upon the nonviolent civil rights advocates.

And so what we are doing here today may be a little bit confusing. Fortunately, we have a transcript to go through this some more; but at a minimum, Chairman McCollum, it seems to me that we would be required to study this matter as extensively as we can.

Now, may I have a few additional moments for a couple of questions?

Mr. MCCOLLUM. You may, Mr. Conyers, briefly. I just admonish you that we have a short day today and another panel.

Mr. CONYERS. Yes. I am admonished. Consider me admonished.

What I am trying to do, and Professor Blakey's suggested proposal for legislation is one that obviously intrigues all of us on the committee, and we will examine it. It probably should be the basis of another hearing separate from anything else we do. But it seems to me that we are dealing with a prospective change in the RICO law that has to be considered very, very carefully. This is not a minor amendment we are talking about here when we talk about striking the whole question of extortion. I mean, this is a huge revisitation of what is, in effect, a very controversial law.

And, with that, Mr. Chairman, I would like to invite Mr. Bograd to make any final comments and everyone else. In other words, have I said anything that offends you?

Mr. BOGRAD. Mr. Conyers, in the years that we have worked with you on the Judiciary Committee, I can't recall too many cases in which you have said anything that offended us. I am sure there are a few occasions, but I will have to consult with my colleagues back at the office.

One thing I did not say in my response to Mr. Gekas that I wish I had said, we are additionally troubled with legislation that is limited to the civil application of RICO and does not apply to its sweeping breadth in the criminal context. If there are problems with RICO, there are problems with the statute as a whole that need to be fixed on an across-the-board basis.

We do think that the guidance provided by the Court in *NAACP* v. *Claiborne Hardware* is the key to understanding what the appro-

priate limitations of RICO should be, and I was encouraged by the proposed legislation which Professor Blakey brought with him today. It obviously seems directed much more closely at considerations of the first amendment implications raised not just by civil RICO, the use of civil RICO against political advocacy groups, but any form of civil liability, and we would certainly be interested in exploring those matters further.

We think like you. As you recall, we stood with you in opposition to RICO in 1970. And, like you, we are very troubled by many of the excesses of the statute but think any reform needs to be approached in a broad-based manner that takes into account all of those concerns, rather than targeting a particular application by or against a particular ideological cause.

Mr. CONYERS. Thank you.

Mr. Kerr?

Mr. KERR. Yes. You spoke quite eloquently that during the civil rights movement much of the violence was directed against the people advocating change in a nonviolent manner, and we have heard a number of definitions put forth today of extortion and things like that.

I would again just request that we take a hard look at the very real threat of harm that RICO itself is posing to groups like PETA and other nonviolent advocacy groups. Because when you talk about a threat of harm, a threat of financial and economic harm and the chilling effect on our ability to aggressively put forth our philosophy, RICO itself can be deemed to do violence or harm to those types of groups.

Mr. CONYERS. Has your organization ever been sued under RICO?

Mr. KERR. Yes, once in 1997.

Mr. CONYERS. Thank you.

Attorney Brejcha?

Mr. BREJCHA. Yes, Mr. Conyers. Let me reiterate, if I may, that our clients were absolved by the District Court of involvement in any claimed act of murder, kidnapping, arson. Those are predicate acts under RICO. The Court commented, not only does the evidence fail to support the plaintiffs' theory, it lends credence to the contrary proposition.

The idea was the same as could have been used against the civil rights movement if in fact RICO was on the books back then. Thank God, it wasn't. Sitting at a lunch counter takes property from that lunch counter if that is systematically part of a campaign, as indeed it was back in those days. Those who lead the campaign may be assailed not only with rhetoric but by lawsuit as racketeers.

The issues are different now. The protest subjects are different, but the principle exists now that the statute is being used to suppress protest of all sorts, and our case is one example of what may prove to be quite many examples.

Mr. CONYERS. Is that the extortion portion of RICO that you claim are the rights being violated?

Mr. BLAKEY. Yes. Extortion as the key to it, because that is the way by which you attack demonstrations. Violence short of arson,

murder, kidnapping is addressed under the law by other statutes, including the FACE Act passed by this Congress in 1994.

Mr. CONYERS. As you well know, all of the predicate acts are addressed by other laws, Federal and State.

Attorney Volokh?

Mr. VOLOKH. Yes. In the Scheidler opinion from the District Court, the Court talks about what the predicate acts under the Hobbs Act are; and it lists blockades, sit-ins, rescues and then goes on to list some actual assault. And the question, it seems to me, is should these be treated the same, or should blockades and sit-ins be treated differently from assaults and vandalism—should blockades and sit-ins be excluded from RICO and the more serious violence remain included in RICO? And that, it seems to me, is the question; and one could answer it either way.

Mr. CONYERS. Thank you.

Professor Blakey?

Mr. BLAKEY. I would thank the Chairman and you, Mr. Conyers, for listening to me. My written statement is pretty thorough. I would offer to any member of the committee or the chairman or the staff to do anything to be of help. You know my phone number, and I will be glad to help out in any way I can. I have nothing further to say.

Mr. MCCOLLUM. I thank the panel, and we certainly appreciate you coming the distance that you have.

I will now introduce the third panel.

Fay Clayton is a partner in the Chicago law firm of Robinson, Curley & Clayton, P.C. and was the lead counsel for the plaintiffs in the lawsuit *NOW* v. *Scheidler*. She has represented plaintiffs in a number of civil rights and discrimination cases and is a frequent speaker on topics such as employment and housing discrimination and RICO. She received her undergraduate degree from New College and her law degree from Chicago Kent College of Law.

Second on the panel is Susan Hill, who has been the president of the National Women's Health Organization, a network of eight women's clinics since 1975. Her organization was one of the co-plaintiffs in the case of *NOW* v. *Scheidler*. Ms. Hill has served on the board of the National Abortion Rights Action League and was a founding member of the National Coalition of Abortion Protesters. She received her bachelor's degree in social work from Meredith College.

Our third panelist is Emily Lyons, who worked as a nurse at the New Women All Women Health Center in Birmingham, Alabama, when it was bombed on January 29, 1998. She was severely injured in the bombing. The person suspected of committing this crime is still at large and is also wanted for questioning in connection with the Olympic Park bombing in Atlanta in July, 1996.

The final panelist is Gerald Lynch. He is the Paul J. Kelner Professor of Law at Columbia Law School. He is a former Federal prosecutor and served as associate counsel to the House investigation to the Iran-Contra matter. Mr. Lynch also served as a law clerk to Supreme Court Justice William Brennan. He is the author of a leading study of the RICO law.

I want to welcome the entire panel here today. As I did with the previous witnesses, I wish to offer into the record the entire state-

ments that you have submitted for the record, and without objection they will be admitted. And with that in mind, I would request that each of you summarize your statements and keep them as brief as possible.

Unfortunately for us today, as I advised a couple of others earlier, we go out of session at 2:00, and there are intervening votes which will complicate our remaining time, in all probability. So we want to be fair and let you have the time you need.

Mr. MCCOLLUM. You are first, Ms. Clayton, and if you would proceed, please give us your thoughts.

STATEMENT OF FAY CLAYTON, ESQ., ROBINSON, CURLEY & CLAYTON, P.C., CHICAGO, IL

Ms. CLAYTON. Thank you, Mr. Chairman. I appreciate the invitation to testify before the committee.

As you know, I am here because of my role as lead counsel in the *NOW* v. *Scheidler* trial where a unanimous jury verdict was rendered on April 20. That was after 12 years of litigation.

I am going to be brief, but the three items I want to talk about are, first of all, the importance of RICO in domestic terrorism situations like this where you have a group of kingpins who, for the most part, keep their hands clean but cause a lot of acts to be done by foot soldiers.

I want to talk about how the proposed amendment introduced by Mr. Shadegg would totally eviscerate RICO not only in the context of terrorism against clinics but also as it would apply to any other ideologic extremist group that likes to use force and violence, and I want to explain in particular why the proposed amendment would do nothing to protect nonviolent advocacy whatsoever.

Mr. Bograd's remarks—Mr. Bograd from the ACLU—I thought perhaps he should have been sitting with our panel, because most of the things that he said, apart from the fact that he just hates RICO, basically, support our side. In that regard, we are of one mind.

It is curious that the preface of the proposed bill says that its purpose is to protect "nonviolent advocacy," and yet those words never appear in either of those bills. Nonviolent advocacy doesn't need any more protection. It is protected by our first amendment to the Constitution. Nonviolent advocacy can never be a predicate act under RICO.

The first amendment trumps anything that might suggest that advocacy alone could be a predicate act or any other kind of a crime; and, in fact, the jury in our case was carefully instructed that peaceful protests and lawful speech could not be considered part of any predicate act. First amendment speech has nothing to do with our case.

What this bill would protect is extortion. It would protect the kind of shakedowns that are the centerpiece of the Mafia's activity. Mr. Marine made clear this morning what a green light such a bill would give to the Mafia and every other kind of hate group and extremist group. If you are going to pass this bill, you should call it, as I suggested, the Racketeers' Relief Act or the Extortionists' Protection Act, and I think the Ku Klux Klan and the neoNazi groups will be very happy for your support.

I want to turn to the reasons why RICO was needed in our case to stem the campaign of violence that was organized by the defendants in our case, Joseph Scheidler, Randall Terry and the others against my clients, Ms. Hill's two clinics and against the women who use those clinics.

By 1994, Joe Scheidler, Andy Scholberg and a handful of other people who called themselves radical—that is the word that they used, and you will see it in some of the documents that I have given you. Mr. Scheidler refers to his group as the pro-life Mafia in Plaintiffs' Exhibit 647. That is his own signature. Look at some of the others where they call themselves radicals and so forth.

By the way, they never invited Dr. Jack Wilke's National Right-to-Life Committee to join PLAN because that is a group dedicated to the lawful opposition to abortion. Dr. Wilke's group is not a RICO enterprise, PLAN is. And what Scheidler did was vow to stop abortion by any means available. You will see that in the documents we submitted, too.

And he proclaimed, he and his other cohorts, proclaimed the first or second year would be a year of pain and fear for clinic providers and for women who sought abortions, and that was in the context where we already had dozens of arsons. You will see just a small handful of the letters we showed the jury where Scheidler praises the arsonists, praises the kidnappers who threatened to murder doctors because he said, well, they have a lot of zeal and it sure is effective in saving what he called lives.

Mr. Scheidler likes to say he is nonviolent, but look at Plaintiffs' Exhibit 680 where he says that arson is not violent. It gives you an idea of the kind of word games this man and his cohorts play.

So they founded the coalition, which is more effective than individual efforts. That is why RICO was passed, to get the kingpins who operate the enterprise and plan the activities. They don't have to do the actual acts themselves, but they cause their thousands of foot shoulders to do the activities which they have adopted at annual conventions of PLAN. Their agendas of illegal conduct included things like barricading clinics with Kryptonite locks, blocking clinic doors with junker cars, dismantling medical equipment. This is the use of force and violence.

No PLAN convention was complete without field training where they would go out and practice the new tactics they just agreed on. Look at Plaintiffs' Exhibits 726, 729 and 801, page 17. You will see how they carried out a National Day of Amnesty where they announced that every clinic will either close or be closed by tactics such as blockades, which Scheidler liked to called nonviolent.

It is a total myth that what these people did was peaceable. What they did and what the jury heard was slam Dr. Wicklund against a car, grab her ankle and try to prevent her from getting into the clinic when she was trying to step over the huge blockade in front of the door. They tripped patients. They pushed them to the ground. They grabbed one clinic administrator by her hair, threw her to the concrete sidewalk. It was admitted how they viciously choked one of the women who came in to testify.

We only presented a small handful of the thousands of predicate acts. RICO only requires two, we put in about 130, and the jury found 121. We could have brought a lot more people, but it wasn't

necessary, and there was no need to take the court's time because it was so clear that these acts were done by PLAN, and they were done when Mr. Scheidler, Mr. Terry and the others were present. They were both present when the woman at Wichita was forcibly grabbed and bruised when she was sitting in the car trying to get access to the clinic. Threats were made personally by these men. Defendant Timothy Murphy personally blockaded the door with a Kryptonite lock around his neck.

One woman wasn't even trying to get to the clinic for an abortion but rather for postoperative care to deal with cancer surgery on her ovaries. She was trying to save her reproductive ability. They thought she might use it for an abortion. What did they do? They didn't just hold the bloody fetus sign up in the air. That is protected speech. They took that sign and beat her with it until she passed out and her sutures ruptured. Holding the sign is first amendment protected. Beating the women who want to use the clinics is not.

Let me offer just one illustration on how RICO fits the facts of this case. Scheidler and Randall Terry operated PLAN just like the typical Mafia enterprise, and the incidents in March 1986 in Pensacola show it. The night before the clinic invasion, Scheidler and Joan Andrews and John Burt got together at Burt's house and agreed there would be an invasion. Scheidler said he would go in, too, if he thought he wouldn't be arrested.

So the next morning Joan Andrews, who had a long history of wrecking clinic equipment, and John Burt went in and threw an administrator down the stairs, slammed a NOW volunteer against the wall, causing her permanent injury, destroyed the medical equipment so the clinic couldn't operate for days. Scheidler is out on the street handling the media, taking credit for it, praising their work, saying how many babies they have saved. Burt and Andrews got arrested, of course, with criminal charges. Scheidler got off scot-free until RICO.

There was no other law that we could use in 1986, when this case was brought, to address the forcible blockades and the tactics of force and violence that the Pro-Life Action Network used.

FACE is a wonderful tool, and we thank you for passing it. It gets the individuals. But it doesn't get those who like to insulate themselves at the top, avoiding the jail sentences. They are very different from Dr. King, who proudly went to jail when he thought he had a good cause. Scheidler likes to stay out of jail and let his foot soldiers go to jail. Only RICO would ever reach him.

This campaign of terror that PLAN has conducted for over 14 years is not hypothetical, as the jury found. It is all too real. And since the early 1980's, women's health centers all across the country have been under siege by these terrorist bands. With that unanimous jury verdict, the reign of terror should stop. To amend RICO to retroactively give comfort to the people who engage in this kind of terrorism is an insult to all law-abiding citizens and particularly to the women of American.

Thank you for your time.

Mr. MCCOLLUM. Thank you.

[The prepared statement of Ms. Clayton follows:]

PREPARED STATEMENT OF FAY CLAYTON, ESQ., ROBINSON, CURLEY & CLAYTON, P.C., CHICAGO, IL

INTRODUCTION

I have been invited to testify before this Committee in my capacity as lead counsel for the plaintiffs, the National Organization for Women (NOW) and two women's health centers, in the RICO lawsuit *NOW* v. *Scheidler*, in which a unanimous federal jury verdict was returned April 20, 1998, after 12 years of litigation. In my brief remarks, I will attempt to explain the importance of RICO in domestic terrorism situations like this, where the criminal enterprise is operated by kingpins who largely keep their hands clean while organizing bands of foot soldiers to carry out acts of force and violence. I will address how the proposed amendment would eviscerate RICO, not only in the context of terrorism against clinics whose medical services include abortion, but also in the context of other ideological extremist groups. And I will explain why the proposed amendment would do nothing to protect non-violent advocacy. As I will explain, the federal jury's verdict in our lawsuit was based strictly on acts and threats of force and violence, *not* on advocacy, teaching, leafletting, prayer, or any other form of lawful speech.

RICO DOES NOT CRIMINALIZE ADVOCACY

The preface to the proposed bill states that its purpose is to protect "non-violent advocacy." But non-violent advocacy can *never* be actionable under RICO. Non-violent advocacy doesn't need protection; it is already fully protected by the First Amendment to the Constitution. The plaintiffs in this case have never suggested that non-violent advocacy could or should be a RICO offense, and our trial has nothing to do with "non-violent advocacy."

Curiously, when I read the proposed bill, I see that the bill doesn't even mention advocacy. What this bill would protect is extortion. The shakedowns that are the centerpiece of the Mafia's activity would no longer be predicate acts under RICO. This bill would give the Mafia a green light for every form of extortion. A better title for this bill would be the "Racketeers' Relief Act" or the "Extortionists' Protection Act." If this bill were to pass, the Mafia and every hate group that uses violence to intimidate its ideological opponents would celebrate, and yet lawful speech would not receive any more protection that it already has.

RICO IS AN IMPORTANT TOOL AGAINST ANTI-ABORTION EXTREMISTS

Let me turn to the reasons that RICO was needed to stem the campaign of violence that was organized against my clients by the Pro-Life Action Network. By 1984, Joseph Scheidler, Andrew Scholberg and a handful of other self-described "radical" anti-abortion leaders formed a nationwide coalition that they named PLAN—the Pro-Life Action Network. (They didn't invite peaceful anti-abortion groups, like Jack Willke's National Right-to-Life Committee, to join.) Scheidler vowed to stop abortion by "any means necessary." He publicly praised convicted arsonists for their effectiveness and their zeal. Appropriately, Scheidler called PLAN the "pro-life mafia." In 1985, in the midst of a rash of clinic arsons and bombings, PLAN proclaimed "a year of pain and fear" for anyone seeking or providing an abortion. Scheidler and others claimed that their tactics were "non-violent," but Scheidler also claimed that arson is "non-violent"—which gives you an idea of the word games he and his cohorts play.

PLAN's founders knew that a well-organized coalition like PLAN would be far more effective in closing down clinics than the dozens of constituent anti-abortion groups operating independently. Because enterprises can be so much powerful than individuals acting alone, RICO imposes liability on those who actively *operate* a criminal enterprise, causing it to engage in illegal, "predicate," acts. Even if the operators of the enterprise keep their hands clean and avoid personal liability for the offenses they incite, under RICO, they will be liable for operating the enterprise through illegal conduct.

That is precisely what PLAN's leaders did. Having formed the enterprise, PLAN called its members to nationwide "conventions," where they adopted agendas of illegal conduct and sent PLAN's members to carry them out. (While the majority of the illegal acts were carried out by their foot soldiers, PLAN's leaders committed some of them personally as well.) At the conventions, they agreed to new tactics, like barricading clinics with Kryptonite locks, blockading clinic doors with junker cars, and dismantling medical equipment. And a PLAN conference was not complete without "Field Training," in which the PLAN participants went to a local clinic to practice the unlawful tactics they had agreed to use. One agenda included a "Day of Amnesty" on which PLAN members threatened abortion providers all across the coun-

try that if they did not close voluntarily, the would be closed by tactics such as blockades.

THE LAWSUIT WAS BASED ON FORCE AND VIOLENCE, NOT SPEECH

It's important to dispel the myth that PLAN engaged in nothing but peaceful, First Amendment-protected activity. It did not. PLAN's blockades, invasions and the other RICO violations that the jury found PLAN committed are acts of force and violence. The jury heard testimony from patients and clinic workers who were attached during PLAN's blockades, including blockades at which Joseph Scheidler and Randall Terry were personally on the scene. One doctor, Dr. Susan Wicklund, was grabbed and slammed against a car as she tried to get through the blockade and into her office. Patients were tripped and pushed to the ground. One clinic administrator was grabbed by her hair and thrown to the ground by an Operation Rescue leader. Another was viciously choked by Operation Rescue protesters, leaving serious bruises on her neck. One patient, who was trying to enter the clinic—not for an abortion but for post-operative care following cancer surgery—was beaten with an Operation Rescue protester's sign. The protesters clawed at her and attacked her, causing her sutures to rupture, and she passed out. This is not speech or advocacy.

This case is not about First Amendment activity. My clients have never objected to peaceful picketing, leafletting, or even to hateful, ugly speech by abortion opponents. Calling our clients "murderers," "whores" and "sluts" is not a RICO violation, and we have never claimed it is. The First Amendment protects speech, even ugly speech. But it does not protect the acts of force and violence on which our suit was based. Our case was not based on speech or advocacy, but on acts and threats of force and violence.

RICO IS NEEDED TO REACH THE OPERATORS OF THE CRIMINAL ENTERPRISE

Let me offer an illustration of how RICO fits the facts of the *Scheidler* case, just as it fits the facts of the typical Mafia operation. One of the incidents that led to the filing of this suit occurred in Pensacola, Florida, in March 1986. Scheidler and other Pro-Life Action Network leaders were in town, staying at the home of John Burt, another anti-abortion activist. On the evening of March 25, Joe Scheidler, John Burt, Joan Andrews, and others discussed what form of "protest" they would conduct at the clinic the next day. Several, including Joan Andrews, who was well-known for destroying medical equipment, agreed to invade the clinic the next morning. Scheidler also agreed to enter, if he thought he could do so without being arrested. Sure enough, the next day, John Burt, Joan Andrews and others invaded the clinic. They threw the clinic's administrator down the stairs, injuring her badly; they shoved a NOW volunteer against a wall, causing her permanent injury; and they wrecked the medical equipment, putting the clinic out of business for several days. During the mayhem, Scheidler stood outside, handling press relations for his group. He praised those who went in and took credit for the invasion and property destruction. Although criminal charges were filed against Burt and Andrews, because of his key role in organizing the violence, Scheidler was equally responsible, but it took RICO to hold him liable for those wrongs.

In 1986, there was no other law to address effectively the problems of clinic violence and forcible blockades. There still isn't. Since the passage of the Freedom of Access to Clinic Entrances Act (FACE) in 1994, that law has been an important tool against *individuals* who have obstructed clinic entrances. But RICO is needed to reach the people who direct the foot soldiers of the criminal enterprise from a distance, as PLAN's leaders do.

The campaign of terror that PLAN has conducted for over 14 years is not hypothetical; it is real. Since the early 1980s, women's health centers all across the country have been under siege by PLAN's terrorist bands. With the unanimous jury verdict in this case, that reign of terror should stop. To "amend" RICO retroactively to give comfort to those who organized these acts of violence would be an insult to all law-abiding citizens and especially to the women of America whose Constitutional rights were finally vindicated in this case.

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July 17, 1998

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LITIGATOR, CLINIC PLAINTIFF IN *NOW v. Scheidler*
TESTIFY ON IMPORTANCE OF RICO AS TOOL TO STOP CLINIC VIOLENCE

[redacted] TESTIFY ON RICO
BEFORE HOUSE SUB-COMMITTEE ON CRIME

WASHINGTON, D.C. -- On the heels of the landmark verdict of liability in *NOW v. Scheidler* which found that there is a nationwide conspiracy of violence against abortion providers and women who seek reproductive health services, Susan Hill, President of the National Women's Health Organization, which represents clinics in the case, and Attorney Fay Clayton, Esq., who is the chief litigator, told the House Judiciary Committee that RICO is an essential tool in fighting clinic violence and urged the panel to reject any attempts to weaken the law.

"In *NOW v. Scheidler* we proved for the first time in a civil court that there is a nationwide organized conspiracy to close family planning, abortion, and women's reproductive health clinics. RICO provides an effective vehicle for ending this reign of terror," said Fay Clayton, who successfully argued *NOW v. Scheidler* before the U.S. Supreme Court and U.S. Federal District Court. In the class action lawsuit, the National Organization for Women represents its members and all non-member women whose rights to access services at women's health clinics that provide abortions have been interfered with by the defendants. The National Women's Health Organization represents a class of over 900 women's health care clinics nationwide that provide abortions and have been terrorized for over a decade by illegal activities intended to close them down.

"After having heard all of the evidence, the jury agreed with us that Americans should be free to go to work without fear, to access health care without violence, and to operate businesses free from attacks. The Court said no citizen, regardless of their motivation, is entitled to extort, threaten, or deprive others of constitutionally protected rights," said Susan Hill. "We believe that our victory under RICO will help deter anti-abortion extremists who terrorize providers, clinics, and their patients. By weakening RICO in any way, Congress would be creating a class of criminals who are above the law and effectively sanctioning a new wave of anti-abortion domestic terrorism."

Abortion rights leaders hope that the precedent-setting decision in *NOW v. Scheidler* also will embolden federal law enforcement to pursue criminal RICO actions. Feminist Majority President Eleanor Smeal, who originally filed the case as NOW President in 1986, said "We are urging federal law enforcement to use the criminal RICO statute to go after each and every one of the anti-abortion extremists who engage in violence and illegal activity in order to deny women their constitutional right to abortion."

In the historic *NOW v. Scheidler* case, the National Women's Health Organization proved a nationwide conspiracy of violence against abortion providers and women who seek their services. The jury (4 women and 2 men) found Joseph Scheidler, Pro-Life Action League, Operation Rescue, Andrew Scholberg, and Timothy Murphy, liable under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute. Plaintiff Summit Women's Health Organization in Milwaukee, Wisconsin was awarded $54,000 in actual damages and Plaintiff Delaware Women's Health Organization in Wilmington, Delaware was awarded $31,000 in actual damages. Under RICO, they are eligible for triple that amount, or $225,000. This finding of liability now opens the door for the 900 clinics to seek damages from these defendants for any activities related to the enterprise.

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Mr. MCCOLLUM. Ms. Hill, you are recognized.

STATEMENT OF SUSAN HILL, PRESIDENT, NATIONAL WOMEN'S HEALTH ORGANIZATION

Ms. HILL. My name is Susan Hill. I am the president and CEO of the National Women's Health Organization which owns eight clinics throughout the United States. My organization is the co-plaintiff in *NOW* v. *Scheidler* and represents the class of 900 clinics in this country that provide abortions and have been terrorized for over a decade by illegal activities intended to close them down.

My thanks first to the House Crime Committee for giving me the honor of speaking to you for a third time. My first visit came in 1994, 1 week after the murder of Dr. David Gunn, a colleague and long-time friend. My second visit came 1 month after the murders of Dr. Bayard Britton and James Barrett.

First of all, I want to thank you personally for having passed the FACE bill which I truly believe has saved a lot of our lives.

Each time I felt no shame in asking the committee members to throw away their biases and understand that we, as abortion providers, were under siege. We provide health services that are difficult, necessary and controversial. In the past 10 years, they have also become very dangerous to provide. Congressional wisdom has previously allowed you to understand that, even if you disagree with our views, you believe that we as abortion providers do not deserve to be stalked, threatened or extorted.

I have been providing abortion services every day of my life since 1973. I am proud to be a provider of abortion services and believe that women should be allowed in this country to obtain abortion services in a dignified manner. I believe that doctors should be able to practice medicine with safety and with dignity. All health care workers are noble caregivers. No health care worker should fear violence at their workplace. As Americans, we have a tradition of believing that citizens have a right to a safe work environment.

Our company, the National Women's Health Organization, specializes in providing abortion services in places where others will not provide them. This mission has been extremely difficult but extremely rewarding. In the past 10 years it has also been deadly. We have the same dedication to our work as other health care professionals and public servants. Therefore, we have quietly put on bullet-proof vests, hired personal bodyguards and continued to walk into clinics every day to provide care to our patients. Not only have we been threatened, stalked, bombed, burned and shot at, we also have been continuously and systematically extorted.

I have compared the history of extortionate acts against our businesses as similar to the corner grocery store owner who is visited by a man who tells him if he will pay up every Friday, he will not be hurt, his store will not be burned, and his family will not be threatened, and he will not be killed.

As providers of abortion services, we have been visited each week for years by people associated with an enterprise and have been told in different ways that we would not be harmed, our families would not be threatened and our clinics would not be burned if we would pay the price.

In our case, the price was our profession and our business. If we could cease providing abortion services, we would not be bothered. Dr. Gunn was told this. Dr. Britton was told this. Dr. Tiller was told this. Dr. Gunn and Dr. Britton paid the ultimate price. Dr. Tiller survived to tell his story. All were extorted.

I looked to Webster's dictionary before the RICO trial to understand in common terms the word "extortion." The definition read "to extort, to exact something from someone, to exact by compulsion." In our case, to exact from us the right to do business and provide legal health care.

We began *NOW* v. *Scheidler* in 1986 because we saw an escalation of violence against us and we feared that someone would die as a result of it. Six people died providing services before we came to trial 12 years later. Others have been severely wounded, such as Dr. Tiller and Emily Lyons of Birmingham, who survived the latest bombing and with great dignity is here today to remind all of us that we are not engaged in a war of words but in a tragic life and death situation.

Every nurse who works in a woman's clinic in this country saw Ms. Lyons' scars and her pain. They also saw in her face and her spirit the true courage that gets them through every day. Nurses and doctors in this country should never work in fear for their lives, not in America.

Our RICO case involved more than blockades, more than harassment. We were systematically extorted through threats to us and threats to our business contractors.

Let me read you a short list of suppliers of ours who were threatened if they continued to do business with us: banks, medical supply companies, laboratories, linen supply companies, cleaning companies, printing companies, painters, plumbers, carpenters, Federal Express, UPS, utility workers, and on the list goes.

Every one of these businesses has been threatened, not just in one city but in every city in which we have clinics. Our clinics are in diverse places such as Fargo, North Dakota; Fort Wayne, Indiana; Raleigh, North Carolina; Orlando Florida; Milwaukee, Wisconsin; Columbus, Georgia and Jackson, Mississippi. Most of these cities have nothing in common except for the same extortionate acts against clinics.

In Jackson, Mississippi, our hazardous waste driver refused to pick up because he had been threatened.

In Mississippi, the State would not allow licensure inspectors to do a final inspection on our clinic until we could prove to the State that we had adequate security guards. They were that fearful of their lives in the clinic.

During the RICO trial, we had an attempted arson at our North Dakota facility which is still unsolved at this time. Three weeks after the RICO verdict, our Orlando, Florida, clinic was the victim of a butyric acid attack along with 10 other clinics in Florida. All of these attacks as well as subsequent butyric acid attacks in New Orleans and Houston are unsolved.

What also is extremely frightening is that we now see wanted posters and other threatening materials proliferating on the Internet. I would like to submit copies of these for the committee.

[Materials on file with the subcommittee.]

Our opponents are exacting something from us, our right to do business. Joseph Scheidler and Randall Terry, two of the defendants in our RICO case, taught these tactics to their followers through books and workshops. Mr. Scheidler proclaimed a year of fear and pain and said that abortion providers would feel the pain of a thorn twisting in our side.

Mr. Terry proclaimed the No Place to Hide Campaign, instructing followers to seek us out and find out our business relationships. Shortly after that proclamation, wanted posters with our doctors' pictures appeared, and we knew that we were being hunted.

There is nothing prayerful or peaceful about the attacks that we have lived through. It is blasphemous to couch extortion in religious terms or to liken these leaders to Dr. King. Dr. King died trying to give people their constitutional rights. Our doctors have died protecting our constitutional right.

A jury of our peers listened for 7 and a half weeks to the evidence in our RICO case, and they believed that an enterprise had systematically carried out 1 acts of extortion against us. The jury rejected the defense of peaceful protest wholeheartedly. These were not acts of free speech but extortion. Extortion is not a protected right, even when it is done for political reasons. There is room in our great country for debate and dissent about abortion. There is no room for violence against others with differing beliefs.

This verdict was the right verdict and a lesson for all that even protesters have boundaries and may not cross the line. Please allow us to safeguard the lives of the noble people who have the courage to work in our clinics. By weakening RICO in any way, Congress would be creating a class of criminals who are above the law and effectively sanctioning a new wave of antiabortion terrorism, and we cannot survive that.

Mr. MCCOLLUM. Thank you.

[The prepared statement of Ms. Hill follows:]

PREPARED STATEMENT OF SUSAN HILL, PRESIDENT, NATIONAL WOMEN'S HEALTH ORGANIZATION

My name is Susan Hill. I am the President and CEO of the National Women's Health Organization, which owns nine clinics throughout the United States. My organization is the co-plaintiff in *NOW* v. *Scheidler* and represents the class of 900 clinics in this country that provide abortions and have been terrorized for over a decade by illegal activities intended to close them down.

My thanks to the House Crime Committee for giving me the honor of speaking to you for a third time. My first visit came in 1994, one week after the murder of Dr. David Gunn, a colleague and longtime friend. My second visit came one month after the murders of Dr. Bayard Britton and James Barrett. Each time I felt no shame in asking the Committee members to throw away their biases and understand that we, as abortion providers, were under siege. We provide health services that are difficult, necessary, and controversial. In the past ten years, they also have become dangerous to provide. Congressional wisdom has previously allowed you to understand that even if you disagree with our views, you believe that we as abortion providers do not deserve to be stalked threatened or extorted. I have been providing abortion services every day of my life since February 1973. I am proud to be a provider of abortion services and believe that women should be allowed to obtain abortion services in a dignified manner. I believe that doctors should be able to practice medicine safely and with dignity. All health care workers are noble caregivers. No health care worker should fear violence at their workplace. As Americans, we have a tradition of believing that citizens have the right to work in a safe environment.

Our company, the National Women's Health Organization, specializes in providing abortion services in places where others will not provide them. This mission has been extremely difficult, but extremely rewarding. In the past ten years, it also has

been deadly. We have the same dedication to our work as other health care professionals and public servants; therefore, we have quietly put on bullet proof vests, hired personal bodyguards, and continued to walk into clinics every day to provide care to our patients. In this country, 1.5 million American women each year received dignified services from abortion providers, and every day, in the back of our minds, we have known we are in danger. Not only have we been threatened, stalked, bombed, burned, and shot at, we also have been continuously and systematically extorted. I have compared this history of extortionate acts against our businesses as similar to the corner grocery store owner who is visited by a man who tells him: if he will pay up every Friday, he will not be hurt; his store will not be burned; his family will not be threatened; and he will not be killed. As providers of abortion services, we have been visited each week for years by people associated with an enterprise, and have been told in different ways that we would not be harmed, our families would not be threatened our clinics would not be burned, if we would pay the price. In our case, the price was our profession and our business. If we would cease providing abortion services, we would not be bothered. Dr. Gunn was told this. Dr. Britton was told this. Dr. Tiller was told this. Dr. Gunn and Dr. Britton paid the ultimate price. Dr. Tiller survived to tell his story. All were extorted.

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Our RICO case involved more than blockades, more than harassment. We were systematically extorted through threats to us and threats to our business contractors. Let me read you a short list of suppliers of ours who were threatened if they continued to do business with us:

- banks
- medical supply companies
- laboratories
- linen supply companies
- cleaning companies
- printing companies
- painters
- plumbers
- carpenters
- contractors
- delivery services
- garbage companies
- hazardous waste companies
- Federal Express
- Airborne Express
- UPS
- utility workers
- security officers
- health inspectors
- landlords
- mortgage companies
- lawyers
- florists
- moving companies
- mortgage brokers
- hospitals

Every one of these businesses has been threatened—not just in one city, but in every city in which we have clinics. Our clinics are in diverse places such as Fargo, North Dakota, Ft. Wayne, Indiana, Raleigh, North Carolina, Orlando, Florida, Milwaukee, Wisconsin, Columbus, Georgia, and Jackson, Mississippi. Most of these cities have nothing in common except for the same extortionate acts against clinics. In Jackson, Mississippi, our hazardous waste driver refused to come to the property

after he was threatened. We imported a whole construction crew to Mississippi after local workers were threatened. In Mississippi, the state would not allow licensure inspectors to do final inspections until we could prove we had security guards. During the RICO trial, we had an attempted arson at our North Dakota facility, which is still unsolved at this time. Three weeks after the RICO verdict, our Orlando, Florida clinic was the victim of a butyric acid attack, along with ten other clinics in Florida. All of these attacks as well as subsequent butyric acid attacks in New Orleans and Houston are unsolved. What also is extremely frightening is that we now see wanted posters and other threatening materials proliferating on the internet. I would like to submit copies of these extortionate and threatening internet sites to the Committee.

Our opponents are exacting something from us—the right to do business. Joseph Scheidler and Randall Terry, two of the defendants in our RICO case, taught these tactics to their followers in books and workshops. Mr. Scheidler proclaimed a "year of fear and pain" and said that abortion providers would feel the pain of "a thorn twisting in our sides." Mr. Terry proclaimed the "no place to hide campaign" instructing followers to seek us out, find out all of our business relationships, put pressure on our contractors, and make it impossible for us to conduct business. Shortly after that proclamation, "wanted" posters with our doctors pictures appeared and we knew we were being hunted.

There is nothing prayerful or peaceful about the attacks which we have lived through. It is blasphemy to couch extortion in religious terms or to liken these leaders to Martin Luther King. Reverend King's work was done in a loving peaceful way. He died trying to give people their constitutional rights. Our doctors and workers have died protecting a constitutional right.

All Americans are proud of our legal system. A jury of our peers in Chicago listened for seven and a half weeks to the evidence in our RICO case and they believed that an enterprise had systematically carried out 121 acts of extortion or threats against abortion providers in this country. The jury rejected the defense of peaceful protest wholeheartedly. There were not acts of free speech but extortion. *Extortion is not a protected right, even when it is done for political reasons.* There is room in our great country for debate and dissent about abortion. There is no room for violence against others with differing beliefs. My forebearers and yours believed in this principle strongly enough to build a country and a sound legal system. This verdict was the right verdict and a lesson for all that even protesters have boundaries and may not cross the line. Please allow us to safeguard the lives of the noble people who have the courage to work in our clinics.

By weakening RICO in any way, Congress would be creating a class of criminals who are above the law and effectively sanctioning a new wave of anti-abortion terrorism.

Anti-Abortion Violence Watch

There have been **16** women's health clinic bombings or arsons since January 1997.

A Project of the Feminist Majority Foundation's National Clinic Access Project

July 1998 #11

See reverse for details on incidents

April 1, 1998 • San Diego/Riverside, CA
Pacific Beach Planned Parenthood
No Arrests

January 29, 1998 • Birmingham, AL
New Woman, All Women Health Care Clinic
Eric Robert Rudolph sought as a suspect

January 27, 1998 • San Antonio, TX
Planned Parenthood of San Antonio Southeast
No Arrests

October 19, 1997 • Portland, OR
All Women's Health Services **No Arrests**

July 28, 1997 • Tuscaloosa, AL
West Alabama Women's Center **No Arrests**

May 27, 1997 • Portland, OR
Lovejoy Surgicenter **No Arrests**

May 7, 1997 • Yakima WA
Planned Parenthood Central WA **No Arrests**

April 8, 1997 • Bozeman, MT
Mountain Country Women's Clinic
John Yankowski sentenced

March 17, 1997 • Bakersfield, CA
Family Planning Associates Medical Clinic
Peter Howard sentenced to 18 years

March 7, 1997 • North Hollywood, CA
Family Planning Associates **No Arrests**

March 6, 1997 • Greensboro, NC
Piedmont-Carolina Medical Clinic **No Arrests**

February 16, 1997 • Falls Church, VA
Commonwealth Women's Clinic
James Mitchell sentenced to ten years

January 16, 1997 • Atlanta, GA
North side Family Planning **No Arrests**

January 1 & 19, 1997 • Tulsa, OK
Reproductive Services. Greg Paul, Diane [illegible] charged & teenage son convicted

Wisconsin • August 8-14, 1998
Missionaries to the Preborn will be protesting at clinics in 50 cities throughout Wisconsin as part of their "Freedom Tour '98."

Butyric Acid Attacks on Clinics Spread

Clinics in Texas & Louisiana Hit Following Florida Attacks

Nine Texas and Louisiana Women's health clinics in a period of less than a week have been attacked with Butyric acid, a noxious smelling chemical that irritates the eyes and skin and causes respiratory damage if inhaled.

On July 6 employees at five women's health clinics in New Orleans returned to work to find their buildings had been attacked with butyric acid. The clinics attacked included a Planned Parenthood clinic, Gentilly Medical Clinic for Women, New Orleans East Women's Clinic, Women's Heath Care Center and the Tenet Physician's Building in nearby Metairie. No one was injured in any of the attacks, as they occurred sometime over the long Fourth of July weekend.

In the early morning hours of July 8 four clinics in Houston, TX were also hit. The Clinics attacked were: A to Z Women's Clinic, Aarons/Women's Pavilion where the chemical was dumped in the clinic's hallway, AAA Concerned Women's center where a gallon of the chemical was spilled inside the clinic's lobby, and America's Women Clinic where the acid appears to have been poured through a hole drilled in the door. Eight people were temporarily hospitalized for nausea and dizziness.

These latest butyric acid attacks follow the recent string of attacks at ten women's health clinics in Miami and Central Florida, where three clinic workers were injured.

The FBI and local law enforcement are investigating the attacks in all three states and searching for links. There are similarities in the way the chemical was introduced into the buildings. The acid was either poured into the clinics through small holes drilled into doors or window frames, through hoses placed in mail slots or someone entered the clinics during business hours and spilled the chemical on the floor.

Clinic Buffer Zones Upheld

The Texas Supreme Court unanimously upheld a $1.2 million damage award on July 3 against anti-abortion groups who blockaded Houston-area abortion clinics during the '92 Republican Convention. The Court also upheld virtually all of a lower court order restricting protest activity within buffer zones around the clinics and homes of several physicians who perform abortions. The Court lifted buffer zones around five clinics where there was no evidence of anti-abortion harassment; restrictions against blocking access to clinics, pushing or shoving or intimidating patients and other aggressive behavior will remain in effect at all the facilities. The ruling states that no more than one demonstrator at a time may enter a buffer zone to speak with patients, but they must leave when the person indicates a desire to be left alone.

Increased Law Enforcement Presence Dampens Anti-Abortion Protests in Florida

Operation Rescue National's plans to gather thousands of anti-abortion protestors to Orlando this summer fell sorely short. The week of activities designed to protest abortion, pornography and homosexuality drew no more than 80-100 participants.

The law enforcement community's decision to take pro-active measures was a significant factor in minimizing clinic disruptions during the week-long protests. The Florida Department of Law Enforcement increased clinic monitoring. And in an attempt to keep demonstrators from blocking clinic entrances, the city of Orlando and the Orlando Police Department obtained an emergency injunction which restricted disruptful activities within 1,000 feet of local abortion clinics. Among those arrested for violating the city's injunction were Operation Rescue National Director Flip Benham and Tom McGlade, whose two sons were arrested earlier in the week.

The Feminist Majority Foundation's annual Clinic Violence Survey shows that increased local law enforcement presence at clinics dramatically helps lower violence.

Arsons/Attempted Arsons

Fargo, ND • April 6, 1996
Attempted arson of the Fargo Women's Health Organization between 5-6:00 a.m. A diesel fuel mixture was spread around the interior of the clinic, but failed to ignite. A window was broken to gain entry, apparently injuring the would-be arsonist. Blood was found on the broken glass and floor.

Riverside/San Diego, CA • April 1, 1996
Planned Parenthood of San Diego and Riverside Counties was firebombed around midnight. An incendiary device was thrown on the roof. Metal bars helped extinguished the fire keeping the damages to a minimum. A white RV without plates was spotted leaving the scene.

San Antonio, TX • January 27, 1996
There was an attempted arson at the Planned Parenthood of San Antonio Southeast in the early morning hours. Damage was minimal.

Portland, OR • October 19, 1997
An arson occurred at All Women's Health Services just before midnight. Cardboard was taken from the dumpster, placed next to the building and set on fire. Only the exterior of the clinic suffered damages, which were estimated to be $5,000.

Tuscaloosa, AL • July 22, 1997
West Alabama Women's Center sustained $250,000 in damages, after a firebombing gutted the interior of the building. A flammable petroleum-based liquid and a lighted flare were dropped down a roof vent.

Portland, OR • May 27, 1997
Lovejoy Surgicenter, a target of protests and violence, was set on fire suffering $250,000 in damage, after receiving several bomb threats from 5/17-19. Similar threats were made at other Pacific Northwest clinics.

Yakima, WA • May 7, 1997
Attempted arson at Planned Parenthood Central WA's Yakima Family Planning Clinic.

Bozeman, MT • April 8, 1997
John Yankowski was arrested for setting fire to the building housing the office of Dr. Susan Wicklund. Damage estimated at $3,000.

North Hollywood, CA • March 7, 1997
A "Molotov Cocktail" was thrown through a window at the Family Planning Assoc. Medical Group causing $1,000 in damage.

Greensboro, NC • March 3, 1997
The Piedmont-Carolina Medical clinic was set on fire causing $50,000 in damage.

Falls Church, VA • February 18, 1997
James Mitchell was sentenced to 10 years for setting a Falls Church abortion clinic on fire. No one was injured, but the fire caused an estimated $26,000 in damages.

Bombings/Attempted Bombings

Birmingham, AL • January 29, 1998
An anti-personnel device packed with nails exploded at the New Woman, All Women Health Care Clinic, killing a security guard and seriously injuring a clinic nurse. The bomb was disguised as an otherwise harmless object and was partially concealed near the clinic's front door. The Army of God has claimed responsibility in letters sent to two media outlets in Atlanta. The clinic interior was damaged and windows were broken, but the clinic was able to reopen within a week.

Louisville, KY • January 6, 1996
A clinic received a hoax bomb in the mail disguised as a video tape. The Christmas-paper wrapped package contained bomb components including PVC pipe, batteries and wire.

Little Rock, AR • September 22, 1997
Three women's clinics were targets of bomb hoaxes as President Clinton visited the city. At two clinics, Ryder trucks were parked outside, blocking their driveways. Police bomb squads responded, along with the ATF and FBI. A third clinic had its locks tarred shut.

Bakersfield, CA • March 17, 1997
Peter Andrew Howard was arrested after driving a truck loaded with 18 gas cans and 3 propane tanks into the Family Planning Associates Clinic. Howard tried to ignite a fire, but was interrupted by a clinic security guard.

Atlanta, GA • January 16, 1997
Two bombs were set off at Northside Family Planning Services. The first bomb destroyed most of the interior of the clinic. The second bomb, an anti-personnel device, was placed near the parking lot and appeared to be designed to kill rescue workers, law enforcement personnel, and clinic staff forced outside the building. Seven were injured in the second blast, including five law enforcement officials. On February 21, a similar double-bombing was attempted at a lesbian night club. Five people were injured in the first explosion; the second device was discovered and exploded while a robot attempted to disarm it. A few days later, a letter from the "Army of God" sent to Atlanta news agencies, claimed credit for both the February 21 and January 16 bombings. FBI authorities believe the same bomber/s were involved in the 1996 Olympic Park bombing in Atlanta.

Tulsa, Oklahoma • January 14-15, 1997
Two separate bomb incidents at the Reproductive Services and Adoption Affiliates clinic caused damage to the interior of the building. A teenager was convicted in the bombing and his parents were charged.

Butyric Acid Attacks

Houston, TX • July 3, 1996
4 women's healthcare clinics in Houston were attacked with Butyric acid. 8 people were temporarily hospitalized.

New Orleans, LA • July 6, 1996
8 women's healthcare clinics in New Orleans were attacked with Butyric acid over the holiday weekend. No one was injured.

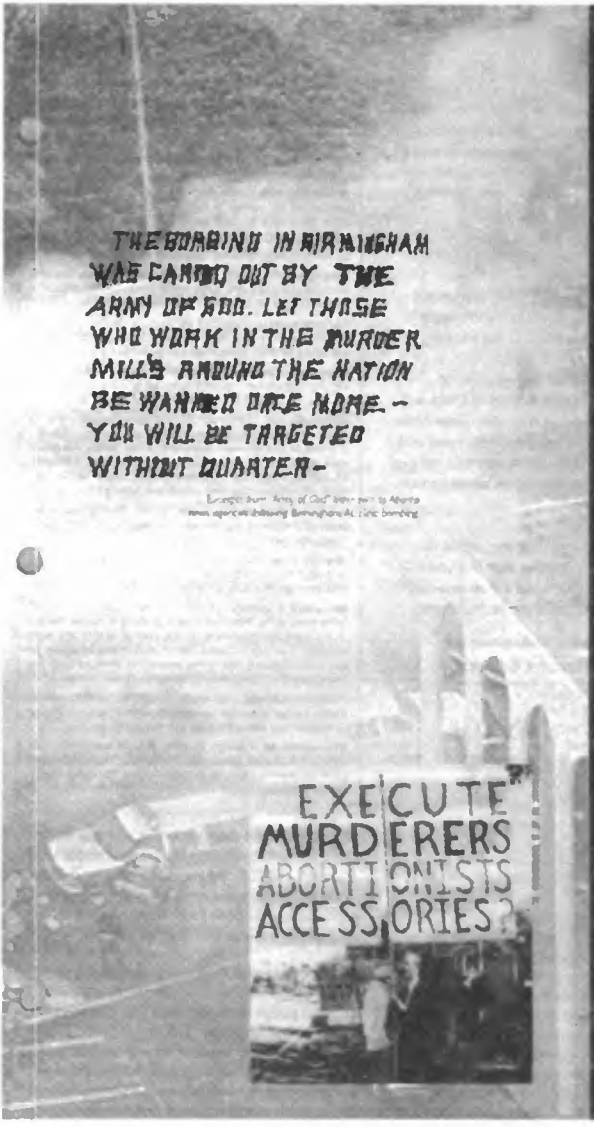
Central Florida/Miami • May 18-26, 1996
10 women's healthcare clinics in the Miami and the central Florida area were attacked with butyric acid in seven days. On **May 26**, National Women's Health Services in Clearwater and Women's Health Center in St. Petersburg had holes drilled in their doors and butyric acid poured in the clinics. On **May 21**, five Miami area clinics were attacked with butyric acid including: Multiple Medical Services noticed a pool of the liquid inside the clinic; Advanced Women's Care Center had two clinic workers hospitalized after entering the clinic and being exposed to fumes; Today's Women Medical Center had acid poured through a window; A Choice for Women Clinic had butyric acid poured in the lobby; A Quality Women's Clinic employee called police after complaining of respiratory problems. Also, 3 Clinics in Central Florida were hit with butyric acid the weekend of **May 18-19**. Family Planning Center and Women's Health Center Inc. in Daytona Beach and National Women's Health Organization of Orlando had holes drilled in the windows and acid was injected.

Arrests/Convictions

Sacramento, California • April 26, 1997
Richard Thomas Andrews was sentenced to 7 years in prison for arson attacks against 7 family planning clinics in California, Montana, Idaho and Wyoming from 1992 to 1995. He was ordered to pay $3,600 in restitution to the clinics that suffered losses, totaling more than $1 million.

Sacramento, California • February 5, 1998
Peter Andrew Howard was sentenced to 12 years in prison for his attempt to destroy a Family Planning Associates clinic in Bakersfield, California, after pleading guilty to attempted arson and use of an explosive device.

The Anti-Abortion Violence Watch is compiled by the staff of the Feminist Majority Foundation and is published monthly. Incidents listed here are drawn from National Clinic Access Project reports and other sources, and are a sampling of anti-abortion violence. To report anti-abortion activities or for more information on the National Clinic Access Project, call Washington DC (703)522-2214 Los Angeles (213)651-0468 or write to 1600 Wilson Blvd #501, Arlington, VA 22209



The extremist wing of the anti-abortion movement is serious and it is deadly. Fuelled and nurtured by the pro-choice movement and the massive support for abortion rights among the American people, these violent extremists seek to deny women their right to reproductive choice. They have foisted their own private justice over and over again.

Whatever they call themselves and however they justify their crimes, they are cold-blooded terrorists who conspire to share tactics, information and funding, using violence in the name of religion and the name of life. Their goal is to deny our constitutional right to abortion and they have demonized us as a way to provide justification for their own violent activities.

THIS IS AN ORCHESTRATED, STRATEGIC CAMPAIGN OF DOMESTIC TERROR.

For two decades reproductive health clinics and abortion providers throughout the United States have been under attack. There have been thousands of incidents including blockades, invasions, chemical attacks, arsons, bombings, death threats, shootings, sniper attacks, and cold-blooded murder.

Every month women's clinics are closed or temporarily disabled because of violence. Although overall the level of violence at women's clinics is half of what it was just four years ago, it is becoming more concentrated and more lethal.

Anti-abortion extremists are waging a war of attrition. This strategy targets one set of clinics and health care workers today . . . then after these clinics are closed or severely injured, extremists move on to target another set of clinics. While abortion remains legal, the tide of violence jeopardizes access to vital medical services.

In 1997 there were 13 bombings and arsons of women's health clinics, escalating after two years of declines. Severe violence plagues almost one-quarter (24.8%) of women's clinics across the country.

1997 Bombings & Arsons at Women's Health Clinics

Source: Anti-Abortion Violence Watch, Feminist Majority Foundation

Anti-abortion violence more and more has come to resemble the work of trained terrorists. In the January 1997 clinic bombing in Atlanta, anti-abortion extremists used a double bomb – the first aimed at destroying the building and the second anti-personnel device aimed at killing or injuring law enforcement and rescue personnel, a classic terrorist tactic. The January 29, 1998 early morning bombing at a Birmingham, Alabama clinic killed a security guard and critically injured the clinic's head nurse. Signalling a new level of terror and violence, this was the first bombing of an abortion clinic to result in a fatality.

Terrorist Attacks on Abortion Providers: Murders, Attempted Murders & Kidnappings

Granite City, IL - August 1982. Dr. Hector Zevallos and his wife were kidnapped at gun-point by members of the "Army of God" and held hostage for over a week.

Springfield, MO – December 1991. A masked gunman shot and paralyzed a clinic worker. A second person was wounded in the attack. No arrests have been made.

Houston, TX – 1991. Dr. Karpen was shot and wounded outside his clinic. Assailant was never apprehended.

Pensacola, FL – March 10, 1993. Dr. David Gunn was shot and killed while entering a clinic during an anti-abortion demonstration by Rescue America. Michael Griffin was sentenced to life.

Wichita, Kansas – August 19, 1993. Dr. George Tiller was shot in both arms at point-blank range by Rachelle "Shelley" Shannon as he was leaving his clinic. Shannon was sentenced to 11 years.

Vancouver, Canada - November 8, 1994. Dr. Garson Romalis was shot and severely wounded in the leg by a sniper with a high powered rifle shooting through the window of Romalis' home.

Brookline, MA – December 30, 1994. John Salvi shot and killed Planned Parenthood receptionist Shannon Lowney. Going to a second clinic, he shot and killed receptionist Leanne Nichols. Five others were wounded in the attacks. Salvi then drove to a clinic in Norfolk, VA and was arrested after repeatedly shooting outside the clinic trying to gun entrance. Salvi killed himself while serving a life sentence.

Ancaster, Ontario – November 10, 1995. Dr. Hugh Short was shot in the elbow by a sniper using a high-powered rifle to shoot through the window of Short's home.

New Orleans, LA – December 1996. Dr. C. Jackson was brutally stabbed 15 times outside his clinic. The assailant was then arrested at a Baton Rouge clinic as he lay in wait for another doctor.

Atlanta, GA – January 16, 1997. Two bombs explode at Northside Family Planning. The first bomb destroyed the clinic interior, and the second bomb, an anti-personnel device, went off an hour later injuring Seven. Three weeks after a similar double bombing occured at an area lesbian nightclub, injuring five people. The "Army of God" has claimed credit for both bombings. Bomber(s) remain at large.

Winnipeg, Canada – November 11, 1997. Dr. Jack Fainman was shot by a sniper with a high powered rifle while in his home. Missing his heart by only inches, the bullet tore through his shoulder.

Birmingham, AL – January 29, 1998. A bomb packed with nails exploded at the New Woman, All Women clinic killing the security guard and maiming a clinic nurse. "Army of God" has claimed credit. Bomber(s) remain at large.

All too frequently these violent attacks against clinics are not reported in the national media, with coverage limited to the immediate area in which the arson or bombing occurred. Even our strongest supporters often don't know how serious and widespread anti-abortion violence remains.

Without wider reporting and understanding of the nature of this terrorism, we fear the country will come to accept violence at abortion clinics as part of the normal landscape. Nothing could be more dangerous. Unless an informed and aroused public opinion demands more vigorous federal and state law enforcement investigations and prosecutions of anti-abortion extremists, we will be condemned to lose clinic after clinic in an invisible war of attrition.

The Feminist Majority Foundation's National Clinic Access Project

Can anything be done to stop these domestic terrorists who are trying to achieve with violence what they have not been able to do in the courts or by law? The Feminist Majority Foundation's National Clinic Access Project leads efforts nationwide to keep women's health clinics open in the face of violence and intimidation and to bring anti-abortion terrorists to justice.

Mobilizing Community Support

Since 1989, the Project has mobilized and trained more than 40,000 community volunteers to support clinics and counter anti-abortion harassment and blockades in 43 cities in 25 states.

National Emergency Response Team and Clinic Survival Assistance

The Project provides direct emergency legal, security, and media assistance to besieged clinics. Our goal is to get a clinic open again as quickly as possible following a violent attack – and to send a message to anti-abortion terrorists that they will not succeed in closing even a single clinic with violence. The Project provides emergency grants and loans to install security equipment, including surveillance cameras, bullet-resistant glass, alarm systems, cellular phones and pagers, and bullet proof vests.

Security Assessments and Training

The National Clinic Access Project provides on-site professional security assessments and provides training to clinic staff in security procedures.

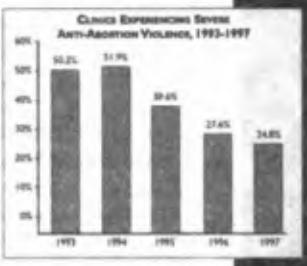
Emergency 24-Hour Clinic Security Hotline and Emergency Alerts

We run a 24-hour Security HOTLINE free of charge to clinics across the country. Our Emergency ALERTS notify clinics of threats and situations that might pose a threat in their area.

Litigation Strategy and Assistance

The Feminist Majority Foundation's legal team won a precedent-setting U.S. Supreme Court ruling in June 1994 establishing the constitutional right for clinics to secure buffer safety zones in *Madsen v. Women's Health Clinic*. Today, nearly one-third of all clinics in the country are protected by buffer zones, effectively helping to stem anti-abortion violence.

Feminist Majority Foundation President Eleanor Smeal and Reverend Conservator Kathy Wells face off with Operation Rescue founder Randall Terry at the Aware Women Center for Choice in Melbourne, FL.



Source: 1997 Clinic Violence Survey Report, Conducted by the Feminist Majority Foundation

Feminist Majority Foundation field organizers train clinic defenders in Denver, CO.

Law Enforcement Communications and Briefings

We secure intervention of local, state and federal law enforcement officials to stop clinic violence, frequently serving as a vital communications link between clinics and law enforcement. Together with the National Abortion Federation and Planned Parenthood, our Law Enforcement Briefing Project provides local and state law enforcement with the latest information on trends in anti-abortion violence and activities of anti-abortion extremists.

Field Research & Tracking of Extremists

Over the years, we have built extensive files on anti-abortion extremists, including photographs, records of violent incidents and intelligence on anti-abortion extremist organizations and their activities. Twelve times a year, we report our findings to over 1,100 law enforcement officials and agencies in our *Anti-Abortion Violence Watch* bulletin. Our annual National Clinic Violence Survey is the most complete measure of anti-abortion violence and trends, and is used extensively by law enforcement and the media.

Strategic Media Outreach and Public Education

This newest component of our National Clinic Access Project will highlight the positive achievements law enforcement and the pro-choice community have made in reducing overall violence at women's health clinics, while alerting the nation to the threats these terrorists and their violence pose to our democratic values.

The National Clinic Access Project assists independent clinics as well as affiliated clinics, and non-profit clinics as well as for-profit.

Feminist Majority Foundation

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Mr. CONYERS. Chairman McCollum, just by way of introduction, I want to thank you and Chairman Hyde for adding Ms. Lyons.

Ms. Emily Lyons worked as a nurse at the New Women All Women Health Care in Birmingham, Alabama, until January 29 when the clinic was bombed, killing a Birmingham police officer, Robert Sanderson, and left Emily Lyons suffering from substantial physical injuries, including the loss of her left eye, as well as hundreds of deep welts left by the nails and gravel packed into the bomb that exploded into her body. And we are very grateful that she would have the courage and the tenacity to come before the committee today, and I thank you for your introduction.

Mr. MCCOLLUM. Thank you for elaborating on the introduction. We are pleased that you are here, Ms. Lyons.

STATEMENT OF EMILY LYONS, BIRMINGHAM, AL

Ms. LYONS. My name is Emily Lyons. I am a nurse, obviously not a working nurse now, a wife and a mother of 2 teenage daughters. I am also a victim and a survivor of anti-choice terrorism. When you look at me, the injuries you see are a direct result of a conspiracy of violence against abortion providers in this country.

On January 29, 1998, my life was changed drastically when a bomb exploded outside the clinic where I worked. I lost a friend, the police officer who was killed, and I nearly lost my own life. And if you look at the picture of all of the damage that was done to that building, it is amazing that a human could have survived all of that. So it is truly—it is probably as close to death as you can come.

Because of the ongoing FBI investigation, I can't talk about the details of that day, but I can tell you what has happened to me since then. In the past 6 months, I have had approximately 30 hours of surgery. So I have been in an operating room hospital a fair amount of time, and I have had nine different operations, and that is not all of them. I still have numerous multiple pieces of shrapnel left in my body which some of them will need to be removed in the near future. I can't walk without help, I can't drive and I can't go to work any more.

Prior to all this, before the bombing, I spent 20 years working in the medical profession as a nurse. During that time, I have done it all medically. For a good bit of time, I was a labor and delivery nurse. Before moving to Birmingham, I did home health care, so most of my patients were elderly. I have gone the whole spectrum. I have brought many people into the world, and I have held the hand of many who have died.

As I was trying to think today about how I could get my point across to you a little bit more, to physically let you know what I have been through, a visual is the only thing that I can give you, a rundown.

I want to stand up. My left eye had to be removed, and they had to tell my husband we need your permission to remove it. So what does that do to your family, also?

My right eye was damaged. My vision is still extremely poor. I can't read unless somebody puts it on a computer in large print and prints it out for me. I can't read a book.

My face is full of rocks from the bomb where it was planted under the ground. The right side of my face was broken. My eye orbit was fractured. My teeth, my eyelids were torn off. They had to be sewn back on. My whole face was covered in multiple lacerations which had to be sewn up. So much that if my children saw me the first day, they would have never recognized me. I don't recognize me in the pictures any more either.

The bomb blast tore a hole in my abdomen. They had to take 10 inches of my intestines out. There were no other internal injuries abdominal-wise, which was a good thing for me. There is shrapnel still left in my chest. The bomb tore the skin off my shins, exposing both my legs. It shattered my left leg. They had to put an external fixator on my leg which is pins and rods into the bone attached to another rod outside, and that is what you live with for weeks. The skin grafts that they had to use came from my thigh. It is much lighter now in color than it was, and it goes all of the way up. That will never be the same.

Everywhere you see a dark spot on my body, and there are others elsewhere, too, is where something went into my body, either a nail, a piece of shrapnel, a rock. Any item that that bomb threw at me, I have it in my body somewhere.

My right arm was burned. My left arm is fine, but my right arm was burned, and it goes all of the way up. My hand was mangled, and they did the best repair job that they could, but that is as good as it gets on this. The skin was ripped off my hand.

And if that is not a good enough mental picture for you, then Congressman Conyers has some more pictures up there that will give you a more graphic detail of what it looked like before. That is just the physical aspect.

Then you have the mental aspect of what I have had to deal with. The agony of therapy, days in the hospital when you know I can't do this any more, and then you have to think that whoever did this to me would be winning if I let them, so you force yourself to go on. The pain will lessen, but it will never go away. The mental scars are there, and there is nothing to do to remove those at all.

And my ear. I have fairly good hearing still on one side. My eardrum ruptured several weeks ago from the pressure, and that had to be repaired, and that was extensive surgery for that. I still have poor hearing.

So you have a nurse now who can't read unless it is real big. I can't go to work. I can't write. I pretty much can't do anything right now. And instead of taking care of people that I used to, people have to take care of me now, and that is my family, my friends, my children. They are providing me the care for me now that I used to do for them.

Mr. CONYERS. Mr. Chairman, could we take a recess at this point?

Mr. MCCOLLUM. We are about to have to take one.

Ms. LYONS. It is not very long.

Mr. MCCOLLUM. If you can attempt to finish in 2 minutes, otherwise we need to take a recess.

Ms. LYONS. I am not interested in sympathy. Sympathy doesn't get you anywhere. However, I am determined to make sure that people see the end result of this terrorism.

Mr. CONYERS. Mr. Chairman, there are 3 and a half minutes remaining. I would respectfully ask that you consider that we take a recess.

Mr. MCCOLLUM. If that is your wish and if Ms. Lyons is not prepared to finish right now, I think that is acceptable.

However, when we recess, we have multiple votes. We will try to be back as close to 1:30 as we can, but it is probably going to be closer to 1:45, and we only have a very brief period of time left for the hearing at that point in time.

The subcommittee is in recess until following the votes.

[Recess.]

Mr. MCCOLLUM. The Subcommittee on Crime will come to order.

When we recessed, we had just about completed the testimony of Ms. Lyons, and we went for votes. We have now come back. The difficulty with scheduling on a day that is a getaway day and the last votes of the day are present for us, for Members, has been difficult, as it always is. We are absent at the moment Ms. Lyons. We have asked for her to return, and I understand that she will be here shortly.

In the meantime, in the interest of expediting this matter of the hearing which we need to complete today, we still have Professor Lynch's testimony to hear from. I am going to ask him to proceed with his testimony, and we will resume and conclude with Mrs. Lynch when she returns.

In the meantime, I wish to announce to the committee that, unfortunately, the pressure of the moment is going to take me personally away, and I am going to turn the gavel over during probably Mr. Lynch's testimony to Mr. Barr.

Mr. MCCOLLUM. Mr. Lynch, you may proceed. We look forward to hearing your testimony. Thank you.

STATEMENT OF GERALD LYNCH, ESQ., PROFESSOR OF LAW, COLUMBIA LAW SCHOOL

Mr. LYNCH. Thank you very much, Mr. Chairman.

After the moving and dramatic testimony that we have just heard, it is almost embarrassing to return to technicalities about the RICO statute. But if the committee is seriously interested in reforming RICO, rather than simply in ad hoc legislation to retroactively drive a spike through a particular lawsuit like the one that Ms. Clayton and Ms. Hill have so graphically described, it is necessary to understand how RICO works, how the pieces of it fit together, and what about it makes it a threat to civil liberties.

The first question I suppose is why is a statute that supposedly was originally directed at organized crime at issue at all in the kinds of matters we have been hearing about this morning. RICO is a complex and particularly abstract statute. Unlike such crimes as murder or robbery, theft or even fraud, RICO is not defined in terms of concrete actions that can be observed and identified by an eyewitness. Unlike terms such as rape or burglary, RICO or even racketeering is not a word that has a commonly understood meaning in ordinary English. RICO is defined instead in terms of broad

and abstract concepts: the enterprise and pattern of racketeering activity.

An enterprise under RICO can be any structured activity, legal or illegal, formal or informal—a corporation, a Government office, a Mafia family, a law practice or civil rights organization or just a group of loosely affiliated people who share a common goal. The pattern of racketeering activity consists of two or more crimes from an extremely long list that covers almost all forms of criminal acts in violation of either State or Federal law. Though the statute says very little about what makes those acts into a pattern, the Supreme Court has elaborated on that.

Forgive me if this seems an excessively academic or abstract description, but that is the only way it is possible to talk about RICO. That is why RICO can cover almost any kind of activity. That is why it can be applied to organized crime groups, to business enterprises, to Members of Congress as well as to political activists organizations.

Generally speaking, RICO on its face does not present a threat to the law abiding. No one can violate RICO without committing or agreeing to participate in committing acts that are separately defined as crimes elsewhere in the Penal Code. On the other hand, because RICO imposes extremely serious penalties that are potentially applicable to anyone even marginally involved in criminal acts, because some of the predicates for RICO such as mail fraud and extortion are themselves quite broad in their coverage and because conspiracy liabilities can sweep extremely broadly and can bring in even people who have not committed substantive RICO violations, it is possible that the RICO statute can be applied to people who are only marginally involved in anything criminal.

Second question, why are we concerned here only with, or primarily, with civil RICO?

Much of the criticism of RICO, particularly the criticism we have heard today about *NOW* v. *Scheidler*, is directed at civil RICO. It is important to understand, however, that no civil verdict is possible without a finding that the defendants have committed a criminal violation that potentially subjects the offender to as much as 20 years in prison or, in some cases, even to life imprisonment.

Usually, in our legal system, we think the standards should be stricter for criminal liability than they are for civil. In RICO, however, we often see proposals such as the ones before the committee that would leave intact the criminal provisions of RICO but would preclude civil lawsuits.

Third, how does RICO apply to politically motivated groups?

Now v. *Scheidler* first came to national attention in 1994 when the Supreme Court upheld the complaint against the argument that RICO could only be used against groups that had an economic motivation. The argument was an attempt to limit RICO in a way that would prevent its application to political activists.

We have heard a lot this morning about advocacy groups. The Supreme Court unanimously rejected that argument, and it was correct to do so for two reasons.

First, technically, nothing whatsoever in the language of RICO justifies any such limitation. Enterprise is defined too broadly. Second, as a matter of policy, it would be strange and self-defeating

to apply RICO to a Mafia group that murdered people out of greed but not to a terrorist group that committed exactly the same type of crime with exactly the same kind of structure of organization out of political motivation.

As the Justice Department pointed out to the Supreme Court in an amicus brief, *NOW* v. *Scheidler*, the argument raised by the antiabortion demonstrators in the Supreme Court would prevent the use of RICO against such groups as the World Trade Center bombers.

What makes RICO, both civil and criminal, potentially dangerous to political activists is more or less the same thing that makes it so useful to prosecutors of serious criminals. The very broad and abstract definitions of the crime make it possible, especially in conspiracy prosecutions, to tie together numerous defendants and to include very different sorts of predicate acts committed in different places at different times, with different quantums of evidence against different defendants into a single prosecution or a single civil suit with the attendant risk that jurors will be confused and overwhelmed by the evidence and will convict by association individuals who would not be convicted or found liable if they had to be tried individually for specific, concrete crimes. That is the essence of the problem, and it is a problem not merely for political activists but for those accused of business crimes or memberships in narcotics conspiracy or organized crime groups as well.

Fourth, the specific draft legislation before the committee. The committee staff faxed me yesterday two variations of a proposal that would exclude from civil RICO, both Government and private, any lawsuit based on a predicate act of extortion. The apparent rationale for this proposal is that extortion was a critical predicate in the Scheidler complaint. With apologies for my bluntness, this idea is simply stupid. Extortion is not only in its most ordinary application an extremely serious and violent crime, but it is also one of the most common activities of organized crime at which the RICO statute was originally directed. RICO's most basic target was the infiltration of legitimate businesses by organized crime and predatory acts of organized crime against legitimate business enterprises. It was thought that civil lawsuits could be a useful weapon against such organized crime activities.

Extortion such as protection rackets, such as coercing legitimate businesses to use the services of particular subcontractors like garbage hauling companies and things of that sort, were a particular target of RICO. Suppose, for example, corrupt labor officials threatened to sabotage a construction site unless they were paid off or given no-show jobs for Mafia-related colleagues, a classic case of extortion and one in which a civil lawsuit might be effectively brought against the union leaders, one that would be precluded if extortion were eliminated from the list of predicates or civil liability.

The same might apply to politically motivated organizations. Consider the case of *United States* v. *Bagaric*, decided in the Second Circuit in 1983. In that case, a group of Croatian nationalist terrorists were convicted of criminal RICO violations for a pattern of violence and murder against members of the Croatian-American community that was designed to extort money for its terrorist cam-

paign by intimidating law-abiding people into making contributions under threat of being bombed. I can't imagine any Member of Congress would support legislation that would exempt such a scheme from civil RICO sanctions.

This morning we have heard some alternatives suggested, alternative ways of altering the idea of extortion. One possibility would be to limit extortion to so-called violent extortion. That would have an interesting ripple affect. It would protect corrupt politicians. Because extortion, nonviolent extortion is primarily prosecuted under extortion of official right by which public officials threaten to use their power to impose economic loss on their victims. That kind of side effect presumably is not intended by the committee.

We have also heard it suggested that extortion should be limited to the taking of property. That also seems problematic. Why should a violent threat directed to obtain $100 from a businessman be subject to RICO liability while the same violent threat directed to prevent someone from carrying out their constitutional rights be exempt from RICO? Indeed, as Mr. Marine from the Justice Department pointed out this morning, many of the Government's civil RICO suits in the labor racketeering area rest on the predicate of extortion not of money but of extortionist threats that attempt to prevent union members from exercising their political rights guaranteed under the National Labor Relations Act.

The idea of tinkering with extortion as a predicate for RICO requires a careful rethinking of the entire structure of RICO, not an ad hoc elimination of extortion of some particular kind as a predicate in order to retroactively alter the course of a particular litigation.

Finally, let me suggest alternative strategies, one cautious and one radical.

First, the cautious one. I have not myself carefully examined the evidence in the Scheidler case. I can recall reviewing the complaint at the time of the Supreme Court decision and being troubled by it. It seemed to me that the complaint did not properly state a violation of RICO as to all of the defendants charged in the case. It was unclear to me whether the individual defendants were, in fact, charged with or could be proven to have participated in conspiring about those individuals who actually committed criminal activities.

I think, however, it makes a great deal of sense not to overreact to a verdict that has yet to be reviewed on appeal or indeed even reviewed by the trial judge. If the defendants were proved to have engaged in a pattern of criminal activity, which is after all what RICO requires, then they absolutely deserve to suffer the consequences that RICO makes available. If a group of antiabortion activists or political dissenters of any type, left or right, undertake an organized campaign to threaten violence against other citizens in order to intimidate their victims from foregoing exercise of their rights, then they deserve to be prosecuted criminally and held liable to their victims. If, however, the evidence is insufficient to establish that some or all of the defendants actually participated in such a campaign, then they did not violate RICO and, presumably, the verdict against them will not stand.

I realize that even an ill-conceived lawsuit can cause enormous damage to defendants. We heard this morning from representatives

of a variety of groups who have been made to pay extravagant costs in defending RICO actions, even if those actions were ultimately won or settled. But virtually any law can be abused, and unfounded or harassing lawsuits should not lead us to deny appropriate remedies to those who can legitimately claim damages. It seems to me generally a poor idea to change the law in response to what may be perceived as a single unfair result, certainly not until the courts have finally spoken.

Now, the more radical counsel. Some laws are more subject to abuse than others. RICO strikes me as such a law. Indeed, the question of RICO's possible application to legitimate political dissent is not new. It was raised by Senator Kennedy. It was raised by Representative Conyers back when RICO was originally proposed.

The problem is not the inclusion of some particular predicate act such at extortion, nor is the problem unfounded lawsuits brought by overaggressive plaintiffs' lawyers. The problem is that the protean and abstract statute is too broad and does not sensibly discriminate between serious patterns of organized criminality and less significant kinds of violence.

If the committee and the Congress ultimately want to review the RICO statute, it seems to me the question should begin at the beginning: What are the legitimate uses of RICO that have been successful? What are the ones that have been abusive on a broad basis?

Indeed, the civil RICO remedy deserves to be reconsidered at large. Private civil RICO actions have most commonly been brought simply by one business against another business in what have been characterized repeatedly by the courts as garden variety allegations of fraud. But reform of that kind of problem with civil RICO should not be undertaken ad hoc as a favor to particular political activists groups that have been on the receiving end of RICO lawsuits. Congress did that once before, doing a favor to the securities industry by making securities fraud violations more difficult to prosecute under RICO civilly while leaving untouched all other kinds of businesses that might be subject to the same kind of harassing lawsuit.

But both the cautious and the radical strategy have a common root. When you have an extremely broad statute that, because of its breadth and its flexible abstract nature, is susceptible to hundreds of different kinds of uses and to some kinds of abuses, it is generally not a promising strategy to try to patch the statute with ad hoc responses to particular cases that some political faction or other finds abusive.

To avoid the possibility of abuse, it is necessary to carefully review the statute as a whole and its many possible applications to understand the effects that a rifle-shot alteration of a single predicate act might have on criminal prosecutions, on Government civil actions, on other kinds of civil lawsuits other than the ones that you are particularly concerned with, rather than to look to a complaint that you don't like, identify something that would make that complaint impossible, and then, particularly retroactively, to take that particular predicate out of the statute.

Thank you very much.

Mr. BARR. [Presiding.] Thank you, Professor.
[The prepared statement of Mr. Lynch follows:]

PREPARED STATEMENT OF GERALD LYNCH, ESQ., PROFESSOR OF LAW, COLUMBIA LAW SCHOOL

Thank you very much for the invitation to testify here today. The question of the applicability of both the criminal and civil aspects of RICO to public advocacy groups is an important one, though not a new one. Senator Edward Kennedy, in opposing the enactment of the RICO statute in 1970, called attention to the possibility that the statute could be abused to prosecute legitimate dissenters. The attention being given now to the verdict in Chicago holding anti-abortion activists civilly liable under RICO has simply returned attention to this important issue.

In the limited time available to me in these prepared remarks I want to address a few fairly elementary points. First, I will briefly review the basic structure of RICO, and the problems that inhere in that structure. Second, I will note the relationship between the criminal and civil remedies made available by the statute. Third, I will talk about the application of the statute to politically-motivated activities. Fourth, I will address the specific discussion draft proposal that I understand is being considered by the Committee. And finally, I will suggest both a very radical and a very cautious alternative to that proposal.

First, then, the basic structure of RICO.

RICO is a complex and abstract statute. Unlike such crimes as murder, robbery, theft, or even fraud, RICO is not defined in terms of concrete actions that can be observed and identified by an eyewitness; unlike crimes such as rape and burglary, "RICO" or even "racketeering" is not a term that has a commonly-understood meaning in ordinary English. RICO is defined in terms of two very abstract, and very broad, concepts: the "enterprise" and the "pattern of racketeering activity."

An "enterprise" under RICO can be almost any structured activity, legal or illegal, formal or informal: a corporation, a labor union, a government office, a Mafia family, a law practice, a civil rights organization, a church or just a group of people, loosely affiliated with each other, who share a common goal. The "pattern of racketeering activity" consists of two or more crimes from an extremely long list that covers most kinds of criminal acts in violation of state or federal law. Though the statute says nothing about what makes those acts into a "pattern," the Supreme Court has said that the acts have to be "related" in some way to each other, and also have to demonstrate at least a threat of "continuity" over time. The three substantive crimes defined by RICO are each defined in terms of different conceptual relationships between an enterprise and a pattern of racketeering.

Forgive me, please, if that seems an excessively conceptual or academic description. The fact is, it's impossible to speak of the statute in any other way. Because it is so abstract, and so broadly applicable, RICO has proven adaptable to virtually any form of criminal activity. Political and labor corruption, business crime, organized criminal activity, terrorist groups, and ordinary violent crime have been prosecuted using the RICO statute.

Almost all of these prosecutions have utilized one of the three sections of RICO, 18 U.S.C. § 1962(c). This section makes it a crime to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. Note how broad that is. Anyone who commits two or more related crimes of almost any sort while participating in the conduct of virtually any sort of formal or informal organization is covered. And if that were not broad enough, remember that § 1962(d) piles an additional abstraction on top of this: it is also a crime to *conspire* to participate in the enterprise in violation of § 1962(c).

Generally speaking, RICO does not on its face pose a threat to the law-abiding. No one can violate RICO without committing, or agreeing to participate in the commission of, acts that are separately defined as crimes. On the other hand, because RICO imposes extremely serious penalties that are potentially applicable to almost anyone who is involved in criminal acts, and because a number of the crimes that are covered by RICO, such as mail fraud and extortion, are themselves quite broad in their coverage, activities that are only marginally criminal can become the basis for extremely serious penalties.

Second, the relation of civil and criminal penalties.

Much of the criticism of RICO, and in particular criticism of the Chicago abortion verdict, is directed at civil RICO. It is important to understand, however, that no civil verdict is possible without a finding that the defendants committed a criminal violation that potentially subjects the offender to as much as 20 years in prison.

Usually, in our legal system, we are prepared to allow civil lawsuits for compensation in situations where we would not tolerate criminal punishment. Whenever it is proposed to limit the reach of *civil* RICO, without changing the contours of *criminal* RICO, we should pause to consider what's going on. If, for example, Congress were to pass legislation that in one way or another precluded a *civil* lawsuit such as the one brought against pro-life demonstrators in Chicago, without changing the contours of the *criminal* statute, you would be saying, in effect, that it is unfair to subject such demonstrators to a lawsuit for damages, but it is perfectly OK to lock them up as criminals for 20 years. In short, any potential abuse of the civil provisions of RICO is also a potential abuse of the *criminal* provisions.

There are, of course, reasons why civil RICO has been subject to greater abuse. First, the lesser civil standard of proof may make it possible to find a defendant civilly liable, when prosecutors would be unable to persuade a jury of criminal guilt by the higher standard of proof beyond a reasonable doubt. Second, the Justice Department, in the exercise of prosecutorial discretion, has had a pretty good record of refusing to apply RICO to its fullest possible literal extent, while private lawyers representing potential plaintiffs have no obligation or incentive to show similar restraint.

But the fact remains that if you are disturbed about a possible unfair application of the statute that has appeared on the civil side, exactly the same application could be made, with even more drastic consequences, in a criminal prosecution. All that prevents it is the good judgment of prosecutors.

Third, the application of RICO to politically-motivated groups.

NOW v. *Scheidler* first came to national attention in 1994, when the Supreme Court upheld the complaint against the argument that RICO could only be used against groups that had an economic motivation. The argument was an attempt to limit RICO in a way that would prevent its application to political activists. The Supreme Court unanimously rejected that argument. It was correct to do so, for two reasons. First, nothing whatsoever in the language of RICO justifies any such limitation—"enterprise" is simply defined too broadly. Second, as a matter of policy, this would be a strange and self-defeating application. It would be perverse to apply RICO to a Mafia group that murdered people out of greed, but not to a terrorist group that committed exactly similar crimes out of political motivation. As the Justice Department pointed out to the Supreme Court in an amicus brief, the argument raised by the anti-abortion demonstrators in the Supreme Court would prevent the use of RICO against the World Trade Center bombers.

What makes RICO—both civil and criminal—dangerous to political activists is more or less the same thing that makes it so useful to prosecutors of serious criminals. The very broad and very abstract definitions of the crime make it possible, especially in conspiracy prosecutions, to tie together numerous defendants, and very different sorts of predicate acts, committed in different places at different times, into a single prosecution, with the attendant risk that jurors will be confused and overwhelmed by the evidence, and convict, by association, individuals who would never be convicted if they had to be tried for specific, concrete crimes. That is the essence of the problem, and it is a problem not merely for political activists, but for those accused of business crimes or membership in narcotics conspiracies or organized criminal groups as well.

Fourth, the specific draft legislation.

The Committee staff has faxed me two variations of a proposal that would exclude from civil RICO any lawsuit based on a predicate act of extortion. The apparent rationale for this proposal is that extortion was a critical predicate for the *Scheidler* complaint. With all due respect, and with apologies for my bluntness, this is simply a stupid idea. Extortion is not only, in its most ordinary applications, an extremely serious crime, but it is also one of the most common activities of organized crime at which the RICO statute originally was directed. RICO's most basic target was the infiltration of legitimate business enterprises by organized crime, and it was thought that civil lawsuits could be a useful weapon against such infiltration.

Suppose, for example, corrupt labor officials threatened to use sabotage a construction site unless they were paid off or given no-show jobs for Mafia-related colleagues. A classic case of extortion, and one in which a civil lawsuit might effectively be brought against the union leaders. Or consider the case of *United States* v. *Bagaric*, 706 F.2d 42 (2d Cir. 1983). In that case, a group of Croatian nationalist terrorists were convicted of criminal RICO violations for a pattern of violence and murder against members of the Croatian-American community that was designed to extort money for its terrorist campaign by intimidating law-abiding people into making contributions under threat of being bombed. I can't imagine why any mem-

ber of Congress would support legislation that would exempt such a scheme from civil RICO sanctions.

Fifth, I promised to give you alternative cautious and radical strategies.

The cautious one, first. I have not carefully studied the evidence in the *Scheidler* case. I can recall reviewing the complaint at the time of the Supreme Court decision, and being very disturbed by it. It seemed to me that the complaint did not properly state a violation of RICO, precisely because it was entirely unclear to me that many of the individual defendants were in fact charged with participating in or conspiring with those individuals who actually committed criminal activities.

I think it makes a great deal of sense not to overreact to a verdict that has yet to be appealed. If the defendants were proved to have engaged in a pattern of criminal activity, which is after all what RICO requires, then they absolutely deserve to suffer the consequences that RICO makes available. If a group of anti-abortion activists, or political dissenters of any type, left or right, undertook an organized campaign to threaten violence against other citizens in order to intimidate their victims into foregoing exercise of their rights, then they deserve to be prosecuted criminally, and held liable to their victims. If, however, the evidence is actually insufficient to establish that the defendants participated in such a campaign, then they did not violate RICO, and presumably the verdict against them will be reversed.

I realize that even an ill-conceived lawsuit can cause enormous damage to defendants, who are forced to defend themselves, sometimes at great expense. But virtually any law can be abused, and unfounded or harrassing lawsuits should not lead us to deny appropriate remedies to those who can legitimately claim damages. It seems to me generally a poor idea to change the law in response to what may be perceived as an unfair result, at least until the courts have finally spoken.

But now the more radical counsel. Some laws are more subject to abuse than others. RICO strikes me as such a law. But the problem is not the inlcusion of some particular predicate act, such as extortion. Nor is the problem unfounded lawsuits brought by over-aggressive plaintiffs' lawyers. The problem is that the protean and abstract statute is too broad, and does not sensibly discriminate between serious patterns of organized criminality and less significant kinds of violations.

The Justice Department won't want to hear this, because it is a conservative organization and does not want to lose a tool which has proved very effective, but I think if the Committee is serious about RICO reform, it should ask much more fundamental questions.

Let me just propose two such questions:

(1) Is the private civil RICO action actually worth maintaining at all? The most pervasive use of civil RICO has been in private suits between business entities accusing each other of fraud. No doubt in many cases there has been actual criminal conduct, but in many more we have "garden variety" business disputes that have been contorted into fraud claims to take advantage of RICO's treble-damage and attorneys' fees provisions. In 1995 Congress acted to limit such suits in the area of securities fraud, by prohibiting RICO suits based on securities fraud, unless the defendant had first been convicted of a crime, but the problem persists. On the other hand, in cases of actual violence and organized crime, private civil actions have been few and far between—as one might expect. Most individual victims quite rightly do not think that mobsters makes good targets for lawsuits for damages.

(2) Is RICO itself, in its present form, valuable? Over ten years ago, I wrote a law review article analyzing RICO prosecutions, and concluded that the only unique contribution RICO made to law enforcement was in the context of the prosecution of illicit organizations like La Cosa Nostra or terrorist groups. I think that is even more true today. Unlike the situation in 1970, or even in the 1980's, with the adoption of enhanced fines and the federal sentencing guidelines, penalties for white collar offenses are today adequate, and there is no need for RICO to enhance them in particular cases. Similarly, where RICO was once a vehicle to gain federal jurisdiction over the corruption of state and local public officials, there are now federal statutes that directly penalize such conduct, and RICO is no longer necessary. Replacing RICO by a more focused statute that prohibited criminal conduct in the context of an organized crime group could capture the benefits of RICO without the costs of an extremely over-broad law.

Both the cautious and the radical strategy, though, share a common root. When you have an extremely broad statute that, because of its breadth and its flexible, abstract nature, is susceptible to hundreds of different uses and to some abuse, it is generally not a very promising strategy to try to patch the statute with ad hoc responses to particular cases that appear abusive to some political factions. To avoid the possibility of abuse, it is necessary carefully to review the statute as a whole, and its many possible applications. A genuine effort to reform RICO has to call into

question its entire structure. Until and unless this body is prepared to do that, it is perhaps best to wait and see whether the apparent abuse of the moment actually presents a problem or not.

Mr. BARR. I would now, first of all, on behalf of the Chairman and the rest of the members of the subcommittee, let me thank all of the witnesses for appearing here today. We very much appreciate your testimony and sharing your thoughts with us.

Ms. Lyons, did you have some final words from your testimony?

Ms. LYONS. Yes, sir.

Before we left for break here, I said I am not interested in sympathy. I am, however, determined to make sure that people see the end result of this terrorism. My injuries are not the result of peaceful protesters. The bomb has scarred me for life, was made with nails, intended to maim and kill people. It was not intended to shut a clinic down.

Statements have been made that the RICO act could be used to impede protesters' freedom of speech. What happened to me was an act of violence, not freedom of speech. And if you can look at that picture and say that is freedom of speech, then my definition is a little different then.

Eric Rudolph has been formally charged with the bombing. He tried to remove my freedom to choose where I wanted to work that day, and my patient's right, choice to have a legal medical procedure.

Today, I am asking you to help keep the tool available to stop this violence from continuing to occur. Yes, there are criminal laws to deal with the anti-choice extremists. However, you need only to look at me to see that those are not enough. How could you take away a law that would help prevent this from happening to someone else? Every day, for the rest of my life, I will have to face the memory of that day. All I can ask is that you think about how you would feel if this happened to someone you loved—your wife, your son, your daughter, your future generations of your family. Please don't take away a law that would deter acts of violence in the future. Thank you.

Mr. BARR. Thank you, Ms. Lyons.

[The prepared statement of Ms. Lyons follows:]

PREPARED STATEMENT OF EMILY LYONS, BIRMINGHAM, AL

My name is Emily Lyons. I am a nurse, a wife, and a mother of two teenage daughters. I am also a victim of anti-choice terrorism. When you look at me the injuries you see are a direct result of a conspiracy of violence against abortion providers in this country.

On January 29, 1998 my life changed forever when a bomb exploded outside the clinic where I worked. On that day I lost my friend, a police officer providing security at our clinic, and I nearly lost my own life. Because of the ongoing investigation I can't talk about the details of that day, but I can tell you what my life has been like since. In the last six and a half months, I've spent almost thirty hours on an operating table in nine different operations, only to still have dozens of pieces of shrapnel permanently left in my body. I can't walk, drive a car, or go to work.

Prior to the bombing, I had spent twenty (20) years working in the medical profession as a nurse. For quite some time, I was a labor and delivery nurse. Prior to moving to Birmingham, I provided home health care. Most of my home patients were elderly. I have helped bring many people into this world. I have also held the hands of many as they left.

Now, my vision is too poor to read. My left eye was destroyed and had to be removed. My right eye was badly damaged. My right hand was mangled beyond repair. The skin was torn off my shins and my leg shattered. The blast tore a hole

in my abdomen so that about ten (10) inches of my intestines had to be removed. My eardrum was ruptured and required extensive surgery. As a result, I am now a nurse who is unable to read, write, or stand for long periods of time. Instead of caring for others, others now have to care for me.

I am not interested in sympathy. However, I am determined to make sure that people see the end result of this type of terrorism. My injuries are not the result of peaceful protests. The bomb that has scared me for life was made with nails designed to maim and kill.

Statements have been made that the RICO Act could be used to impede protesters' freedom of speech. What happened to me was an act of violence, not free speech. Eric Rudolph has been formally charged with the bombing. He tried to remove my freedom to choose where I work and my patient's choice to obtain a legal medical procedure. Today, I am asking you to help us keep a tool to stop this from happening again.

Yes, there are criminal laws to deal with anti-choice extremists. You need only look at me to see that those laws are not enough. How could you take away a law that would help prevent this from happening to someone else in the future?

Every day, for the rest of my life, I will face the memory of that bombing. All I can ask is that you think about how you'd feel if this happened to someone you love—your wife, your son, your daughter. Please don't take away a law that would deter future acts of violence.

Mr. BARR. And, again, I would like to thank all of the members of the panel.

What we would like to do now is to allow members of the subcommittee to ask questions, and for that purpose I would call on the gentlelady from Texas for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, I thank you very much for your kindness. I know you had the opportunity to pose questions first, and I do thank you for your kindness.

If you would pardon a comment that I think you will find appropriate but different, let me apologize to the Secret Service for denial of the State today. It is interesting that, in some instances, we want to take away rights; and then, in other instances, where life or death may be of concern in the instance of the Secret Service protecting the President of the United States, we want to deny rights. But this is the paradox in which we live.

I want to thank Patricia Ireland and NOW for their and her consistent courage on this issue. I might offer to say to you that, unlike Ms. Hill and Ms. Clayton, Ms. Lyons and Professor Lynch who are here today, there are, frankly, others cowering, not out of the lack of courage but just the reality of their lives. Doctors are made to cower in the corners along with nursing assistants and nurses and women who are seeking the necessary health care that they need.

I am applauding the treble damages offered by the RICO provision and gratified for the victory, Ms. Clayton, that you have allowed. You might have noted that, in Houston, we got a Supreme Court—State Supreme Court victory on Friday, and we were chemically terrorized that following Wednesday. So we understand what being under siege is all about.

And let me for a moment just distinguish the NAACP case. I will read the case, because I am not suggesting I am distinguishing it from reading the facts, but I can suggest these facts based on, Ms. Clayton, your testimony.

Violence erupted in the NAACP situation. The NAACP was doing something, and violence erupted around it, this one and that one.

In your instance, the idea of beating a woman over the head with a sign is not violence erupting, it is violence being perpetrated by

the actors and the so-called antiabortionists. So even if I read that case, I am already going to distinguish, because the civil rights movement is very personal to me, as well as the student movement, the anti-violence movement.

And I raise the question and I would like NOW to provide me with this data and others who may have it. We had a number now, but we have had more death under this siege dealing with antiabortion activities then we might have had in the student movement, bar the civil rights movement, which had high numbers. But what are our numbers right now? And if someone cares to answer that, I appreciate that being a question.

Let me say to Ms. Lyons, your bravery is without question. For, as I have said, those in my community were fearing to even be seen standing alongside of some of us who demanded an investigation as it relates to whether there has been a conspiracy or there is a conspiracy. And I acknowledge their fear. As I told the professor, to me, that was a taking, that was a taking of property. They are fearful of even being associated with their particular business.

And by the way, Ms. Hill, I counted them. Twenty-six businesses refused to do business with you.

If I might, in tribute to Dr. Gunn and Dr. Britton and James Barrett and to the panelists here, would you please answer this question? One, can we enhance this statute? How can we enhance it? How valuable would it be to you for there to be personal liability or the ability of Ms. Lyons to have filed a personal claim for her injuries?

And as well, Ms. Hill, if you might, if there is anything else that would help us protect your legitimate and legal business, would you provide me with that insight at this time?

Ms. Clayton—I don't know who wishes to yield to whom.

Ms. HILL. Thank you for that observation. And I think the personal injury was a problem for us in the case. There are hundreds of instances of personal injury that have occurred to clinic personnel and to patients entering clinics throughout the last 10 years.

The Gunn family certainly would have liked to have been able to recover something and were unable to through this kind of an action. I am sure the Britton family also would have been concerned. Both of those men were extorted. Both of them were stalked by known protesters, by people who were associated with various groups that were associated by an enterprise. I think the lack of the ability to recover under personal injury is certainly one of the negatives to us and frustrating to us during trial. So I would welcome that addition.

Ms. JACKSON LEE. Mr. Chairman, I would ask indulgence of 2 additional——

Mr. LYNCH. May I respond also?

Mr. BARR. The gentlelady is recognized for 2 additional minutes. We do want to try to keep the responses short in deference to your travel plans as well as the other Members' travel plans. So the gentlelady has 2 additional minutes.

Ms. JACKSON LEE. The Chairman has said briefly. Can you also in your answer give me the cautious and radical element of your answer?

Mr. LYNCH. In this one, I think I can be cautious and radical at once.

Ms. JACKSON LEE. I would like you to explain.

Mr. LYNCH. This is a very simple answer with respect to personal injury. It is ironic under a RICO statute a person may sue for injury to business or property but not for personal injury. As a result, if you look at the Federal reports you will see thousands of cases where one business sues another where there is no real issue of racketeering. You will find almost no cases against violent terrorists or suits against members of organized crime groups brought by victims of violent crime. Such suits could be made possible by a stroke of the pen. I was very pleased to hear Professor Blakey suggest that. I think that is a valuable addition to the statute.

Ms. JACKSON LEE. Thank you.

Ms. CLAYTON. Very briefly, let me address your Claiborne Hardware case.

Ms. JACKSON LEE. Thank you.

Ms. Clayton, would you also respond to my inquiries or calls for investigations to determine the conspiratorial aspect? I know we have a RICO statute, but just whether or not we do have an ongoing conspiracy in the United States, I raise that—I said I was going to raise that with the FBI Director and the Attorney General.

Ms. CLAYTON. I hope the investigation continues. We have identified a small portion of the number of the members of PLAN which was at one point comprised—it comprised 300 radical anti-choice groups. We were only able to include a small number in our lawsuit because the case was already 12 years old and you can't go on forever. We don't have the resources of the Government. But I dearly hope that investigation goes on.

It has actually taken a new form. In the group it is called ACLA, A-C-L-A, which is even scarier. It has many of the same members from PLAN, and now they are putting out lists of doctors who should be murdered. They publicly and proudly say you should murder doctors for saving what they call live fetuses. It is outrageous. I hope the Government continues to look into it.

One other brief point on the first amendment issue is, I want to point out that our jury instructions—I am a loyal ACLU member. I love the first amendment. We were very pleased. The judge told the jury that lawful speech, even ugly, outrageous speech, even calling our people murderers, whores, sluts, that is protected. It is nasty, but it is not a RICO violation, never can be.

We have never argued it should be. And these defendants were only held liable if the jury found that they authorized, ratified the illegal conduct that was committed. It wasn't somebody unassociated with them. The jury was told they had to find they authorized or ratified it.

Thank you very much.

Ms. JACKSON LEE. Can you give us some information on that PLAN and ACLA, those numbers?

Ms. CLAYTON. I would be delighted, Congresswoman.

Ms. JACKSON LEE. Ms. Lyons, do you have a further comment? Thank you very much.

Mr. BARR. I thank the gentlelady.

The gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. I thank you, Chairman Barr.

This is, in some respects, the most important panel that we have had on this subject today. And I don't say that critical of any of the other witnesses on the other panels. But what you have done is put a face on a subject that a lot of Members of Congress would like to dance around. This is a lawyers' committee; and, oh, boy, anything that we can make more technical, more convoluted, more misunderstandable, don't worry, we have an unlimited supply of activities in that regard. But what has happened here today convinces me that we have to inquire into this subject more.

Professor Lynch, you have done us a main service—a primary, a very important service. And I want to thank you for the personal expense that you have had to pay to join us. I know that it wasn't easy. And your testimony is very, very, very helpful. We propose to add personal injury to RICO. I can't imagine that that couldn't be a bipartisan effort. That shouldn't take intellectual giants long to figure out that that is very appropriate.

There are other things that may be more complex, and that is why we are not going to need one more hearing on RICO. We need a series of hearings. And so I am hoping that our leadership isn't rushing to try to get something through to say we did something about something which becomes a pretty big tendency around here toward the end of a session and the beginning of an election cycle.

So this is—this has all been excellent.

Ms. Hill, could I ask if you have ever had the opportunity to take legal action against some of these groups who have prevented peaceful picketing and the lawful engaging in free speech activities?

Ms. HILL. Yes, sir. We have never sought to prevent peaceful picketing or prayerful—organized prayerful demonstrations at our clinic. We have lived with those for 25 years. There are days that I wish for those. I wish that was all that was in front of the building or that was affecting our business. We would never do that. I am also a lover of the first amendment; and we have only moved when people have taken, we believe, criminal action against us. We would only do that in the future.

Mr. CONYERS. Thank you so much.

Ms. Clayton, your testimony was extremely important as a front-line trial lawyer that did such an excellent job. Why isn't the Freedom of Access to Clinic Entrances Act a sufficient in the case that you described.

Ms. CLAYTON. The FACE act, as we call it, is very important in getting all of the little foot soldiers, the guys that actually blockade, the ones that put the Kryptonite lock around their neck and stand six deep and keep people from getting in. You can pick them off and send them to jail for long terms. They will be replaced. But FACE is very important in discouraging even more hundreds or thousands of people from coming in to do that.

What FACE would never would have allowed us to do, though, was to get the folks that operated PLAN, the Joe Scheidlers of the world, the Randy Terrys of the world, the ones that stand up on their soapbox with their bull horn and say, this is what we will do. These are the tactics that we will use. We will go to the XYZ clinic. We will go there tomorrow at 6. But they don't do anything except

stand on the sidewalk exercising their own personal first amendment rights.

Scheidler has only been in jail for a few hours, something on that order total, and yet he has incited, organized and he is the cause of hundreds of thousands of acts of force and violence, blockades where people were injured, where property was injured and the criminal laws, the State laws were unable to get him. And even FACE, as I read it at least, probably would be unable to get him, because he is too many steps removed. It is just like John Gotti. He doesn't do the individual act. You couldn't get him under FACE, if you use an analogous situation there.

Mr. CONYERS. Of course. Thank you very much.

Could I ask you, Professor Lynch, and Ms. Clayton, if you want to weigh in on it—this is my last question, Mr. Chairman, or last two questions—what would be the effect of this extortion amendment in the application of RICO to Mafia-type cases? And what do you think of a statute, an amendment like this which could be made retroactive, this extortion amendment that could be made retroactive and even affect cases that are now somewhere on appeal?

Mr. LYNCH. Well, those are two different questions, I think.

First, with respect to changes in extortion law, this could have a terrible effect, as Mr. Marine pointed out from the Justice Department this morning, on the Government's civil RICO activities. It depends what you do with extortion and where you put it. In other words, if you eliminated extortion as a RICO predicate, that would have an effect even on criminal prosecutions; and many hard-core organized crime prosecutions are about extortion.

If you change the definition of extortion, either for RICO purposes or in the Hobbs act generally, that can have a variety of unpredictable effects, depending on exactly what change in the definition you are talking about. As I pointed out in my testimony, there are nonviolent but nevertheless hard-core criminal applications of the Hobbs act, including in the political corruption area.

Alternatively, if you limit extortion to financial crimes, there are examples of labor corruption, there are examples of violence against people for exercise of their constitutional or other legal rights that would thereby be rendered noncriminal or at least not criminal under the extortion statute. So that would have an effect.

If you made the change only with respect to civil RICO, it by definition wouldn't affect criminal prosecutions but it could affect Government civil actions such as the ones the gentleman from the Justice Department described. If you limited it only to private civil RICO actions I think what Mr. Marine was trying to suggest this morning is that, while the Justice Department might not have a particular interest in it, individual union members who were pursuing remedies against corrupt union officers could be affected by that.

So there are a lot of effects even on hard-core organized crime that would come from tinkering with the definition of extortion or tinkering with the application of RICO to extortion.

With respect to the retroactivity question, I think we are—it is generally a bad idea to make legislation retroactive unless there is some perception that Congress made some terrible mistake.

With respect to criminal law, of course, we have an ex post facto provision in the Constitution that says you can't make things retroactive. And some of the same policies it seems to me apply with respect to civil litigation. If the defendants in the Scheidler case or any other committed violations of law—and, after all, if this RICO verdict is sustained, it means that those people did things that constitute criminal acts—by definition that would subject them to prosecution and imprisonment for long periods of time to sort of undo the effort of litigation that, under the law, as it existed when the complaint was brought entitled the plaintiffs to damages, it seems to me exceedingly unfair.

It is a very different thing to talk about what are we trying to do going forward. If we want to have a changed RICO law for the future, that is one thing. If we are trying to put a spike in a particular lawsuit after years of litigation, that seems to me to be basically unfair.

Mr. CONYERS. Ms. Clayton, have you additional thoughts?

Ms. CLAYTON. I endorse everything Mr. Lynch just said. And I particularly agree with how unfair it is asking for an ad hoc piece of special litigation.

You know, before this trial, Scheidler said that he and his cohorts would be exonerated by the jury verdict; and, heaven, knows the jury heard all the evidence in more than 7 weeks of trial. Now they are trying to change the rules after the jury came in unanimously against them. That is not fair.

Mr. CONYERS. I yield to Ms. Lee.

Mr. BARR. Without objection.

Mr. CONYERS. Can I ask unanimous consent for 1 more minute?

Mr. BARR. You are recognized for 1 minute.

Mr. CONYERS. Thank you.

Ms. JACKSON LEE. I thank the Chairman very much.

An observation, while the ranking member was querying you, I started to look in this room and started to look at each and every one of you. Frankly, the question has to be asked to Americans. Do most Americans walk around with security in their daily lives and in their comings and goings? Maybe for those who are either listening or viewing they may not recognize that that is occurring in this room somewhere, somehow. Frankly, my own Planned Parenthood offices and others throughout Houston have to secure their own security.

Ms. Hill, without giving away any of your special needs, is that something that comes to your attention and that you feel is necessary for many clinics around the Nation?

Ms. HILL. I believe we were the first clinics in the country to install metal detectors in our facilities, and it was the day after the shooting of Dr. Gunn. I can't tell you how shocked our patients are by the fact that they are forced to walk through metal detectors in order to obtain a health service.

Security guards, we have had personal security guards. I have personal security guards.

It is not a normal way to do business, and it is certainly not a normal way to practice medicine, and I think anything that can be done to allow us to go back to the practice of medicine, which is

what we are there for, and to provide health care services would be welcomed by us.

Ms. JACKSON LEE. In closing, Mr. Chairman, if I might, and I might inquire of Mr. Conyers, just to say that, rather than eliminating extortion out of this as an aspect of legislation, not only would I like to join you in the personal injury but I may also want to look at questions about security, the provisions of such, payment by those who would perpetrate the violence and any other manner, the forcing of local police enforcement which I know many communities do to be required to protect these entities so that this is not a personal business expense. This is a free business legally practicing in the community, and I think we have a definite responsibility to ensure your safety of ingress and egress.

And I thank the Chairman for his kindness and Mr. Conyers for yielding.

Mr. BARR. Thank you.

Mr. CONYERS. Mr. Chairman, I thank you very much for your generosity.

I just want to close this hearing by telling you how much I admire the spirit that Mrs. Lyons has exemplified here today. It is something absolutely incredible. I have never been made more proud of a citizen who, under the circumstances that you lived under since January of this year, is still strong, still determined to seek justice, still determined to make this a better country. And what you have done here today, I can't begin to tell you how much it has added to the proceedings here in the Judiciary Committee. Thank you.

Mr. BARR. I thank the gentleman.

Mr. Lynch, if we could, I just have one additional question for you, and it pertains to the last sentence of your penultimate paragraph of your written testimony. I think you went over it, but I would like to read it into the record and then ask you about it.

You say that replacing RICO by a more focused statute that prohibited criminal conduct in the context of an organized crime group could capture the benefits of RICO without the cost of an extremely overbroad law, close quote.

Do you have any specific language that you could propose to us or to me? I would like to see it with regard to perhaps a more focused statute that captures the essence of what you are saying there.

Mr. LYNCH. I would be happy to supply it to you or to the staff. Actually, I proposed something 10 years ago in a Law Review article that is suitable. This goes not just to civil cases but to criminal as well.

One of the problems with RICO is that many of the uses that are actually quite routine by now against white collar crime, against political corruption, are probably no longer necessary. There are probably other criminal statutes that have filled some of the problems that existed in 1970.

Mr. BARR. And of course you would not only have those enhanced criminal statutes, we have the sensing guidelines which provide much different sentences that weren't available or applicable 10 or 20 years ago. And you also have—this is something Ms. Clayton

should keep in mind also. You also have the reach of the statutes made even broader by the use of the conspiracy.

Mr. LYNCH. Absolutely so. When reading RICO was first widely used in the 1980's it was often used against white collar offenders because the penalty for the ordinary white collar crimes were so low it was only in bringing in the forfeiture and enhanced penalties of RICO that appropriate penalties could be obtained. Since the sentencing guidelines, I don't think anyone would any longer say that the penalties for white collar crime are insignificant in this country. Indeed, I think you have seen a decline in the use of RICO by the Justice Department in a lot of types of situations where it was widely used in the 1980's because it is no longer worth the trouble.

In narcotics cases, the penalties for narcotics dealing are actually in excess of the penalties for RICO, so there is no—it is very—it is much less common than it used to be to see narcotics dealers prosecuted under RICO. So you have a lot of potential for use and abuse of this statute out there where some of the legitimate reasons that led to its being broadened beyond its original use are no longer as necessary.

Mr. BARR. In your experience, would the same also apply to States? Over the past 10, 20 years, have States also strengthened their State laws that would attack some of the underlying criminal activity here without the need for the Federal RICO?

Mr. LYNCH. Many have. One of the big advantages of RICO in organized crime cases broadly conceived, not just the Mafia or some particular organization but organized criminal groups, is that RICO permits the consolidation in a single prosecution of activities conducted by an organization across the country in a variety of different districts, in a variety of different States in a way that no individual State could do.

That as a technical matter I think is much less important with—to corruption or labor or business cases. But with respect to criminal gangs I think that is a value, and it is something that the States really can't deal with. But a terrorist group similarly or groups that operate across a wide swath of the country.

So there are particular uses of RICO that I think remain essential, albeit dangerous and controversial. I mean, we pay a price for the RICO statute. The price is one that you heard about this morning.

If you have a terrorist organization, it is very easy to—take something like the IRA, for example. You have a sort of overt wing and a covert wing. And I think Ms. Clayton has talked about the way in which that can operate in other contexts as well, where some members avoid overt encouragement of violence while others carry out violent acts.

The RICO statute permits the bringing of a large-scale, conspiracy-type prosecution that may enable you to get those kingpins. But, of course, that means you are getting them by a somewhat—somewhat watering down the standards of proof that normally would apply to criminal prosecutions. And that is as true for John Gotti, who is also entitled not to be convicted until he is proved guilty beyond a reasonable doubt, as it is for political activists or anybody else.

Mr. BARR. Thank you. Do you have a cite for your Law Review article that you can give us for the record, please?

Mr. LYNCH. It is in the Columbia Law Review, Volumes 86 and 87.

Mr. BARR. If you could please——

Mr. LYNCH. I would be happy to.

Mr. BARR. We can get that. We have some not insubstantial resources at the Library of Congress that we can use. But if you wouldn't mind, if you have some specific additional language, I would very much like to take a look at it, if you could send that to us.

Mr. LYNCH. I would be happy to.

Mr. CONYERS. Mr. Chairman, I would concur with you. If Professor Blakey writes not only a long witness statement but then supplies us gratuitously with several amendments, the least Professor Lynch at Columbia could do is write out his amendment, because we are all interested in it.

Mr. BARR. I am sure he will, and we very much appreciate.

And, again, on behalf of the——

Ms. JACKSON LEE. Mr. Chairman, before you close, let me make sure that I have made something clear for the record. And I know Ms. Clayton did say it, but I wanted to make sure that she will provide us with those, the information regarding PLAN and I think you said ACLA.

Ms. CLAYTON. ACLA, A-C-L-A. Now I have to qualify this.

Ms. JACKSON LEE. As much as you have.

Ms. CLAYTON. Some of the documents are under protective order. I have to check and see if, consistent with our court rules, I could release them to you. I could petition the court with release of them.

Ms. JACKSON LEE. And even to provide us with the source and we will pursue it. Those are very important aspects of the conspiratorial issue I am raising.

Mr. Chairman, finally, let me say, because I appreciate Mr. Conyers' words for Ms. Lyons, and I note that her husband has joined her, and she has a family. I have organized for this Congress the Congressional Children's Caucus, and we are concerned about children. For some reason, our friends in the antiabortionist movement don't see you as both parents, a mother and a father who love, who give love and are loved. Let me thank you for the vow that you have shown but thank your family, your husband, your relatives, your children for the courage that they have shown and let me to commit myself for not letting your courage be in vain.

Mr. CONYERS. Mr. Chairman.

Mr. BARR. We really do have to adjourn.

Mr. CONYERS. My good friend, and I know I am testing your generosity, but, you know, Mr. Jeff Lyons has been here all day. He and Mrs. Lyons have been holding hands. Would it be beyond the generosity of the chair just to offer him an opportunity to say anything that he might want to if he felt that he wanted to make a statement?

Mr. BARR. We really have to adjourn. We recognize he is here. We very much appreciate his being here. We very much appreciate all of the witnesses being here and again remind all of the wit-

nesses that your full statements and any documents that you have been—that you have submitted will be made a part of the record.

Mr. CONYERS. I take it your answer is no, Mr. Chairman.

Mr. BARR. The answer is no.

Mr. CONYERS. All right. I just wanted to make sure.

Mr. BARR. Thank you. Your diligence is most appreciated.

But if there are any additional documents that you all would like to submit to the subcommittee or to additional members we certainly welcome that. And, again, we appreciate everybody being here.

We stand adjourned.

[Whereupon, at 2:15 p.m., the committee was adjourned.]

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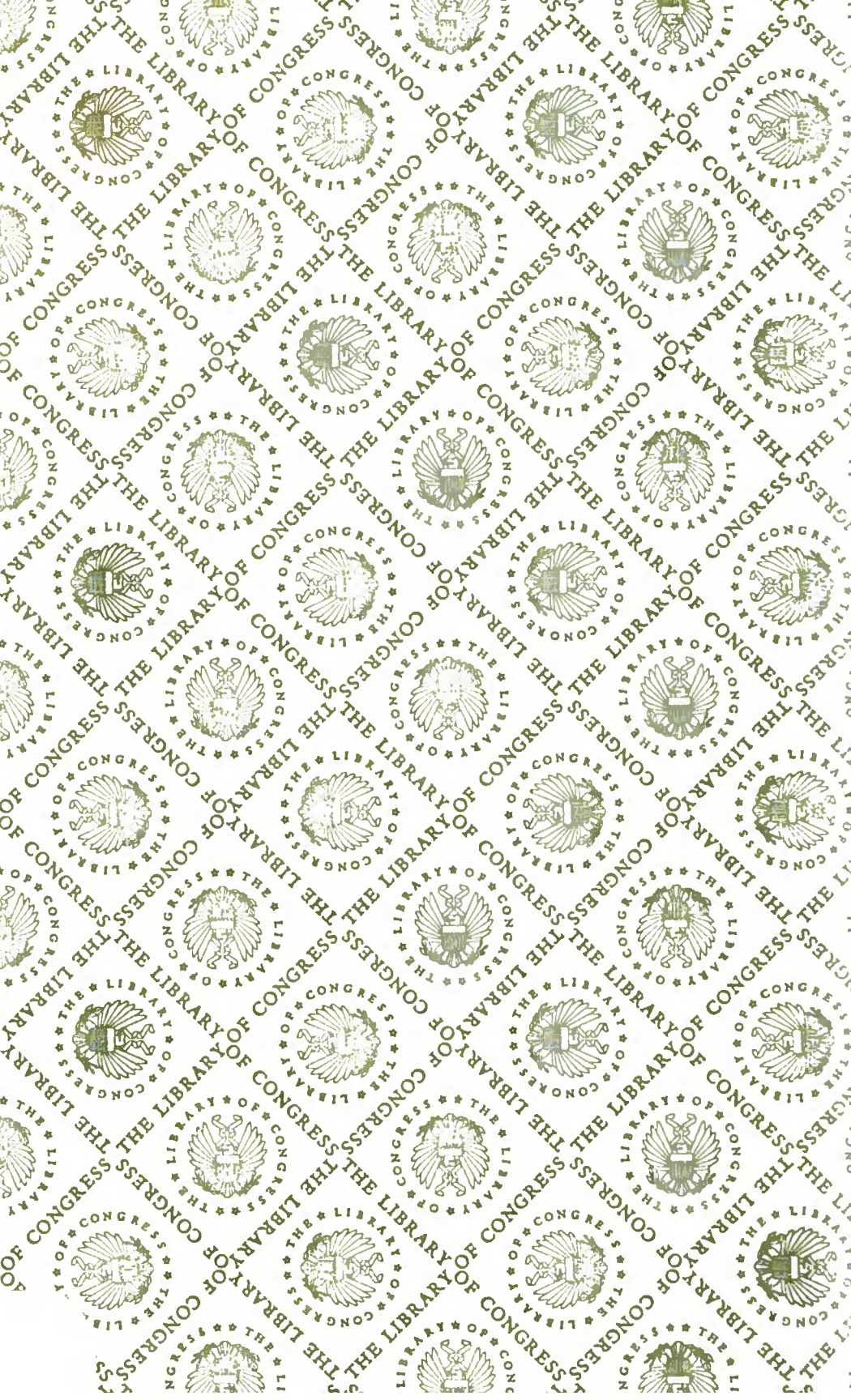
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